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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1961

No. 64

FONG FOO, ET AL., PETITIONERS,

vs.

UNITED STATES

No. 65

STANDARD COIL PRODUCTS CO., INC.,
PETITIONER,

vs.

UNITED STATES

ON WRITS OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITIONS FOR CERTIORARI FILED MARCH 7, 1961
CERTIORARI GRANTED JUNE 19, 1961

SUPREME COURT OF THE UNITED STATES

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[fol. 3]

IN UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

UNITED STATES OF AMERICA, Petitioner,

v.

HONORABLE CHARLES E. WYZANSKI, JR., and the UNITED STATES DISTRICT COURT for the DISTRICT OF MASSACHUSETTS, Respondents.

PETITION FOR WRIT OF MANDAMUS—Filed November 3, 1960

The petitioner, United States of America, petitioning herewith for issuance of a writ of mandamus directing the respondent Honorable Charles E. Wyzanski, Jr., Judge, United States District Court for the District of Massachusetts and the United States District Court for the District of Massachusetts, in the case of *United States* v. *Standard Coil Products Co., Inc. et al.*, Criminal No. 60-6-W, to vacate the "Judgment of Acquittal" entered September 21, 1960, in the said case, and to reassign the case for trial, respectfully alleges as follows:

1. On January 15, 1960 a federal Grand Jury returned an indictment in nine counts (a copy of which is attached hereto, marked "A") to the United States District Court, District of Massachusetts, against Standard Coil Products Co., Inc., a corporation, and two of its employees, Fong Foo and Robert Knupp, and the case was assigned to the respondent Honorable Charles E. Wyzanski, Jr. (hereafter sometimes referred as "the Court"). A copy of the docket entries in the case is attached hereto, marked "B".

2. The first eight counts of said indictment charged that the defendants violated 18 U.S.C. § 1001 by concealing the [fol. 4] material fact that tests of radiosondes, manufactured by Standard Coil Products Co., Inc., at its plant in North Dighton, Massachusetts, for the United States, under two contracts totaling $3,731,084.00, had been fraudulently

conducted, and the results of the tests falsified. Count Nine charged that the defendants conspired with each other and with certain named co-conspirators, to conceal the material fact of the falsification of the tests, in violation of 18 U.S.C. § 371, and in the course of various overt acts committed in pursuance of the conspiracy, instructed certain test operators and co-conspirators to operate the tests on the radiosondes in such a way as to assure that the test results would not reveal any defects existing in the radiosondes being tested.

3. Motions to dismiss the indictment were denied by the Court on March 25, 1960 and August 30, 1960.

4. On June 7, 1960, the petitioner filed Particulars to the Indictment, a copy of which is attached hereto, marked "C."

5. Trial of the above case before a jury commenced on September 8, 1960. A transcript of the testimony at the trial and of such bench conferences as were recorded (hereafter cited "T") is filed herewith in support hereof.

6. In his opening, counsel for the government stated, *inter alia*, that the government, following explanatory testimony as to test procedures and specification requirements to facilitate following the later testimony, would call the test operators as witnesses. Government counsel stated that these witnesses would testify that they ran the tests in a fraudulent manner at the direction of the defendants, who concealed the fraud from the government.

7. On September 12, 1960, following efforts by the gov- [fol. 5] ernment (T. 130-148) to comply with the Court's instructions (T. 130, 132, 148) to introduce into evidence a quantity of documents which the government did not consider relevant to its case (T. 130, 131, 150, 155 (A-31, 32)), the government filed a Trial Memorandum, a copy of which is attached hereto, marked "D." The Trial Memorandum declared that the government would call the test operators as witnesses and set forth generally the nature and importance of their testimony.

8. After calling three witnesses for other purposes (Reizburg — contract documents, Paliotto — explanation, Fisher — agency), the government on September 19, 1960 called Robert Rosenholm for testimony concerning the falsification of the tests. He was the first witness to testify as to the fraud. In the course of his testimony he stated that he believed a discussion he had had with a Mr. Teichman, a Standard Coil lawyer, took place in February, 1958 (T. 681). The trial recessed at the end of the day, September 19, 1960, with Rosenholm's direct examination unfinished (T. 692).

9. On September 20, 1960, when Rosenholm's direct examination was renewed, he was asked whether he was sure of the date of the Rosenholm-Teichman conversation (T. 693). He testified that his best recollection was that it occurred in approximately September, 1957 (T. 693). The Court inquired whether the witness had talked with counsel while testifying in the case (T. 693-694), and the witness replied that he had (T. 694). Thereafter, in the midst of cross-examination of Rosenholm, the Court excused the jury and inquired as to whether counsel for the government wished to make any statement (T. 707). Counsel for the government stated that he had talked with the witness [fol. 6] during the overnight recess concerning the correctness of the date, that he did not consider this improper, and that the date of the Rosenholm-Teichman discussion was a matter to which other witnesses would testify (T. 710). Counsel for the defendants moved for judgments of acquittal (T. 717). In argument opposing the motions, counsel for the government stated that there were many witnesses yet to be heard from, including the test operators (T. 713). The Court then recalled the jury, declared that the government's witnesses had showed a lack of awareness or lack of capacity in connection with their testimonial obligations (T. 715), that the date of the Rosenholm-Teichman discussion was a very vital point (T. 717), and that counsel for the government had admittedly conferred with the witness during the recess. Respondent Honorable Charles E. Wyzanski, Jr. stated that, in response to the motions of acquittal, he directed the jury to

return verdicts of acquittal (T. 718). He then told the defendants that they had been acquitted by direction of the Court and by the Court (Ibid.). The next day, September 21, 1960, the Court entered a "Judgment of Acquittal," a copy of which is attached hereto, marked "E."

10. Rule 29(a) of the Federal Rules of Criminal Procedure provides for the entry of a judgment of acquittal "after the evidence on either side is closed if the evidence is insufficient to sustain a conviction." Rule 57 authorizes a court, where no procedure is prescribed, to proceed "in any lawful manner not inconsistent with these rules." Both the quoted rules and Rule 23, providing that the consent of the government is a prerequisite to waiver of a jury trial in a criminal case, recognize the constitutional right of the government to a trial by jury (U.S. Const., Art. III, Sec. 2, [fol. 7] clause 3), which includes the right of the government to present *all* its lawful evidence, when legally sufficient, to the jury for *their* consideration.

11. At the time the "Judgment of Acquittal" was entered, the government's case had not closed, nor had its evidence been concluded on any aspect of the case. As the Court had been advised, other witnesses were to testify to the date of the Rosenholm-Teichman conversation (T. 710), to the explanatory material (T. 370), and, particularly, to the fraud (T. 378-383, 713, opening, and government's Trial Memorandum, "D"). When the "Judgment of Acquittal" was entered, the government had under subpoena, and planned to call in its direct case fourteen additional witnesses, including the test operators and the co-conspirators (in addition to Rosenholm) named in the Indictment. It could not therefore have been determined, at the time the government's presentation was cut off, whether the government's evidence would or would not be sufficient to sustain a conviction of the offenses charged.

12. The Court's "acquittal" of the defendants and its entry of a "Judgment of Acquittal," was beyond the power of the Court at the stage of the case then reached. In so far as the Court's orders purported to acquit and to amount to a judgment, they were unlawful and null and

void. Given their maximum possible scope, they amounted to no more than the declaration of a mistrial.

13. The said orders of the Court, and the declaration of a mistrial which they accomplished, were entered on the application and motions of the defendants.

14. No sufficient ground existed for the declaration, on application of the defense, of a mistrial. The credibility of the witnesses was a jury question. The conduct of gov- [fol. 8] ernment's counsel was not improper, did not prejudice the defendants, and did not warrant the action taken by the Court.

15. On September 28, 1960, the petitioner filed a Motion to Vacate "Judgment of Aquittal" and for Reassignment for Trial. A copy of said motion is attached hereto, marked "F." The motion was immediately denied, without a hearing.

16. Petitioner has been deprived of its day in court in violation of statute, rule of court, the Constitution and fundamental justice.

17. Other than issuance of the writ of mandamus prayed for, no remedy is available to the petitioner.

18. Issuance of the said writ is necessary and would be appropriate in aid of this Court's jurisdiction under 28 U.S.C. § 1651, since respondent's action in entering the "Judgment of Acquittal" and refusing to vacate the Judgment and refusing to reassign the case for trial has defeated the jurisdiction this Court would have had over the case upon an appeal from a judgment of conviction or other appealable order of the District Court. Moreover, under the exceptional circumstances presented here, intercession by this Court is necessary to preserve the integrity of the administration of criminal justice below.

WHEREFORE, the petitioner prays:

(1) That this Court issue a writ of mandamus to respondents the Honorable Charles E. Wyzanski, Jr., and the United States District Court, District of Mas-

sachusetts, requiring, in *United States* v. *Standard Coil Products Co., Inc. et al.*, Criminal No. 60-6-W:

[fol. 9] (a) That the "Judgment of Acquittal" entered September 21, 1960, be vacated and

(b) That the case be reassigned for trial.

(2) That this Court grant such other and further relief as it deems just.

United States of Ameriea, By: Elliot L. Richardson, United States Attorney; George C. Caner, Jr., Assistant United States Attorney; Joseph S. Mitchell, Jr., Assistant United States Attorney.

[fol. 10] *Duly sworn to by Elliot L. Richardson, George C. Caner, Jr. and Joseph S. Mitchell, Jr., jurats omitted in printing.*

[fol. 11]

ATTACHMENT "A" TO PETITION

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

Indictment Criminal No. 60-6-W

UNITED STATES OF AMERICA

v.

STANDARD COIL PRODUCTS CO., INC.,
FONG FOO, and ROBERT KNUPP

The grand jury charges:

COUNT ONE

1. On or about May 28, 1956, the defendant Standard Coil Products Co., Inc., a corporation organized under the laws of the State of Illinois, and the United States of America acting by and through the Army Signal Supply Agency

(hereinafter sometimes called the Agency), an agency of the United States, entered into a contract, together with certain contemporaneous modifications thereof, known as Contract No. DA-36-039-SC-71686 (hereinafter sometimes called Contract No. . . . 71686), whereby Standard Coil Products Co., Inc., in consideration of $2,365,470.00, agreed to deliver to the United States 25,000 Model AN/AMT-3 radiosondes of a quality set forth in military specifications and standards incorporated by reference in the Contract.

2. The said radiosondes were devices for the furnishing of weather data, designed to be dropped from airplanes and, while floating to earth by parachute, to continuously transmit in repeated cycles radio signals showing the temperature, pressure, and humidity of the air through which the radiosondes passed.

3. It was provided under said Contract No. . . . 71686 that the place of performance of the work called for in the said Contract would be the plant of Standard Coil Products Co., Inc. in North Dighton, Massachusetts, that inspection of the radiosondes for conformity with technical contract requirements would be performed there, that such inspection would be under the jurisdiction of the Army Signal [fol. 12] Supply Agency, and that the said Contract would be administered by the said Agency.

4. Pursuant to said Contract No. . . . 71686, a government inspector representing the Agency from time to time selected sample radiosondes for testing by Standard Coil Products Co., Inc. Thereupon, Standard Coil Products Co., Inc. employees conducted on said samples certain tests prescribed under the Contract. The signals transmitted by the said samples in the course of said tests were recorded on tapes, which were submitted by Standard Coil Products Co., Inc. to the government inspector and purported to show the performance of the radiosondes tested and the results of the tests.

5. Among the tests referred to in paragraph 4 hereof conducted by Standard Coil Products Co., Inc. under said Contract No. . . . 71686, were the so-called "temperature element calibration," "pressure element calibration," "hu-

midity element calibration," and "shock" tests, designed to test the accuracy of the calibration of the radiosondes, on which the correctness of the radio signals given off depended.

6. The Army Signal Supply Agency, in deciding whether or not to accept radiosondes delivered under said Contract No. . . . 71686, relied, as the defendants well knew, on the tests referred to in paragraphs 4 and 5 and on the faithful and honest reporting of test results.

7. The defendant Fong Foo, now of Hollywood, California, was at all times mentioned in this Count employed by the defendant Standard Coil Products Co., Inc., and was from September, 1956 to April, 1958 employed as Chief of the Quality Control Department of its North Dighton Plant in charge of Standard Coil Products Co., Inc. personnel conducting tests of radiosondes under said Contract No. . . . 71686.

[fol. 13] 8. The defendant Robert Knupp, now of Alhambra, California, was at all times referred to in this Count employed by Standard Coil Products Co., Inc., and was, beginning in September, 1956, employed first as supervisor, and later as foreman in charge of production of radiosondes.

9. In or about September, 1956, and at the commencement of production of radiosondes under said Contract No. . . . 71686, the defendants conceived and put into continuous execution a scheme to evade and circumvent the test procedures established under the Contract for the "temperature element calibration" test referred to in paragraph 5 hereof. In furtherance of said scheme, the defendants caused the signals from the sample radiosondes subjected to this test to be recorded, not at the temperature gradation points designated under the Contract, but at whatever points would result in the recording of the signals which the radiosondes were supposed to transmit at the designated points, and, after the desired signals had been thus recorded on the tapes, caused false notations to be made on the tapes indicating that the signals had been transmitted at the points designated under the Contract, thereby

assuring that the records of the test results would not reveal any defects existing in the samples tested.

10. From September, 1956, to November, 1957, at said North Dighton in the District of Massachusetts, the defendants Standard Coil Products Co., Inc., Fong Foo, and Robert Knupp, in a matter within the jurisdiction of an agency of the United States, namely the matter of said Contract No. DA-36-039-SC-71686 and the inspection by the Army Signal Supply Agency of radiosondes delivered to the United States under said Contract, did continuously, and knowingly and willfully, by trick, scheme, and device, cover up and conceal from the government inspector and [fol. 14] the Army Signal Supply Agency the material fact that the said "temperature element calibration" test had been fraudulently conducted and the results of the test falsified in the manner set forth in paragraph 9 hereof.

All in violation of Title 18, Section 1001 of the United States Code.

COUNT TWO

1. For paragraphs one through eight of this Count, the grand jury incorporates by reference and realleges paragraphs one through eight of Count One of this Indictment, and the allegations therein.

9. In or about September, 1956, and at the commencement of production of radiosondes under said Contract No . . . 71686, the defendants conceived and put into continuous execution a scheme to evade and circumvent the test procedures established under the Contract for the "pressure element calibration" test referred to in paragraph 5 hereof. In furtherance of said scheme, the defendants caused the signals from the sample radiosondes subjected to this test to be recorded, not at the pressure gradation points designated under the Contract, but at whatever points would most nearly result in the recording of the signals which the radiosondes were supposed to transmit at the designated points, and, after the desired signals had been thus recorded on the tapes, caused false notations to be made on the tapes indicating that the signals had been transmitted at the points designated under the Contract, thereby

assuring in so far as possible that the records of the test results would not reveal any defects existing in the samples tested.

10. From September, 1956, to November, 1957, at said North Dighton in the District of Massachusetts, the defendants Standard Coil Products Co., Inc., Fong Foo, and [fol. 15] Robert Knupp, in a matter within the jurisdiction of an agency of the United States, namely the matter of said Contract No. DA-36-039-SC-71686 and the inspection by the Army Signal Supply Agency of radiosondes delivered to the United States under said Contract, did continuously, and knowingly and willfully, by trick, scheme, and device, cover up and conceal from the government inspector and the Army Signal Supply Agency the material fact that the said "pressure element calibration" test had been fraudulently conducted and the results of the test falsified in the manner set forth in paragraph 9 hereof.

All in violation of Title 18, Section 1001 of the United States Code.

COUNT THREE

1. For paragraphs one through eight of this Count, the grand jury incorporates by reference and realleges paragraphs one through eight of Count One of this Indictment, and the allegations therein.

9. In or about September, 1956, and at the commencement of production of radiosondes under said Contract No. . . . 71686, the defendants conceived and put into continuous execution a scheme to evade and circumvent the "humidity element calibration" test referred to in paragraph 5 hereof, whereby sample radiosondes selected by the government for subjection to said test were secretly pretested and any defects in them cured during the interval between their selection and their testing under the Contract, the purpose of said scheme being to assure that the test under the Contract would not reveal any defects originally existing in the samples tested.

10. From September, 1956, to November, 1957, at said North Dighton in the District of Massachusetts, the defen-

dants Standard Coil Products Co., Inc., Fong Foo, and [fol. 16] Robert Knupp, in a matter within the jurisdiction of an agency of the United States, namely the matter of said Contract No. DA-36-039-SC-71686 and the inspection by the Army Signal Supply Agency of radiosondes delivered to the United States under said Contract, did continuously, and knowingly and willfully, by trick, scheme, and device, cover up and conceal from the government inspector and the Army Signal Supply Agency the material fact that the said "humidity element calibration" test had been falsified in the manner set forth in paragraph 9 hereof.

All in violation of Title 18, Section 1001 of the United States Code.

COUNT FOUR

1. For paragraphs one through eight of this Count, the grand jury incorporates by reference and realleges paragraphs one through eight of Count One of this Indictment, and the allegations therein.

9. In or about September 1956, and at the commencement of production of radiosondes under said Contract No. . . . 71686, the defendants conceived and put into continuous execution a scheme to evade and circumvent the "shock" test referred to in paragraph 5 hereof, whereby two tapes were run of the sample radiosondes selected for testing prior to delivering a shock to said samples, and, in cases where the tape run after the shock revealed defects, caused the two tapes run before the shock to be submitted to the government inspector with the false representation that one was the "before" tape, and the other, the "after" tape, namely a tape run off after delivery of the shock, the purpose of said scheme being to assure that the records of the test results would not reveal any defects existing in the samples tested.

[fol. 17] 10. From September, 1956, to November, 1957, at said North Dighton in the District of Massachusetts, the defendants Standard Coil Products Co., Inc., Fong Foo, and Robert Knupp, in a matter within the jurisdiction of an agency of the United States, namely the matter of said Contract No. DA-36-039-SC-71686 and the inspection by the Army Signal Supply Agency of radiosondes delivered to

the United States under said Contract, did continuously, and knowingly and willfully, by trick, scheme, and device, cover up and conceal from the government inspector and the Army Signal Supply Agency the material fact that the said "shock" test had been fraudulently conducted and the results of the test falsified in the manner set forth in paragraph 9 hereof.

All in violation of Title 18, Section 1001 of the United States Code.

COUNT FIVE

1. On or about May 6, 1957, the defendant Standard Coil Products Co., Inc., a corporation organized under the laws of the State of Illinois, and the United States of America acting by and through the Army Signal Supply Agency (hereinafter sometimes called the Agency), an agency of the United States, entered into a contract known as Contract No. DA-36-039-SC-74678 (hereinafter sometimes called Contract No. . . . 74678), whereby Standard Coil Products Co., Inc., in consideration of $1,365,614.00, agreed to deliver to the United States 14,200 Model AN/AMT-3 radiosondes of a quality set forth in military specifications and standards incorporated by reference in the Contract.

[fol. 18] 2. The said radiosondes were devices for the furnishing of weather data, designed to be dropped from airplanes and, while floating to earth by parachute, to continuously transmit in repeated cycles radio signals showing the temperature, pressure, and humidity of the air through which the radiosondes passed.

3. Under said Contract No. . . . 74678, it was provided that inspection of the radiosondes for conformity with technical contract requirements would be performed at North Dighton, Massachusetts, that such inspection would be under the jurisdiction of the Army Signal Supply Agency, and that the said Contract would be administered by the said Agency.

4. Pursuant to said Contract No. . . . 74678, a government inspector representing the Agency from time to time selected sample radiosondes for testing by Standard Coil

Products Co., Inc. Thereupon, Standard Coil Products Co., Inc. employees conducted on said samples certain tests prescribed under the Contract. The signals transmitted by the said samples in the course of said tests were recorded on tapes, which were submitted by Standard Coil Products Co., Inc. to the government inspector and purported to show the performance of the radiosondes tested and the results of the tests.

5. Among the tests referred to in paragraph 4 hereof conducted by Standard Coil Products Co., Inc. under said Contract No. . . . 74678, were the so-called "temperature element calibration," "pressure element calibration," "humidity element calibration," and "shock" tests, designed to test the accuracy of the calibration of the radiosondes, on which the correctness of the radio signals given off depended.

6. The Army Signal Supply Agency, in deciding whether [fol. 19] or not to accept radiosondes delivered under said Contract No. . . . 74678, relied, as the defendants well knew, on the tests referred to in paragraphs 4 and 5 and on the faithful and honest reporting of test results.

7. The defendant Fong Foo, now of Hollywood, California, was at all times mentioned in this Count employed by the defendant Standard Coil Products Co., Inc., and was from September, 1956 to April, 1958 employed as Chief of the Quality Control Department of its North Dighton Plant in charge of Standard Coil Products Co., Inc. personnel conducting tests of radiosondes under said Contract No. . . . 74678.

8. The defendant Robert Knupp, now of Alhambra, California, was at all times referred to in this Count employed by Standard Coil Products Co., Inc. as foreman in charge of production of radiosondes.

9. In or about August, 1957, and at the commencement of production of radiosondes under said Contract No. . . . 74678, the defendants put into continuous execution a scheme to evade and circumvent the test procedures established under the Contract for the "temperature element calibration" test referred to in paragraph 5 hereof. In furtherance of said scheme, the defendants caused the sig-

nals from the sample radiosondes subjected to this test to be recorded, not at the temperature gradation points designated under the Contract, but at whatever points would result in the recording of the signals which the radiosondes were supposed to transmit at the designated points, and, after the desired signals had been thus recorded on the tapes, caused false notations to be made on the tapes indicating that the signals had been transmitted at the points designated under the Contract, thereby assuring that the records of the test results would not reveal any defects existing in the samples tested.

[fol. 20] 10. From August, 1957, to November, 1957, at said North Dighton in the District of Massachusetts, the defendants Standard Coil Products Co., Inc., Fong Foo, and Robert Knupp, in a matter within the jurisdiction of an agency of the United States, namely the matter of said Contract No. DA-36-039-SC-74678 and the inspection by the Army Signal Supply Agency of radiosondes delivered to the United States under said Contract, did continuously, and knowingly and willfully, by trick, scheme, and device, cover up and conceal from the government inspector and the Army Signal Supply Agency the material fact that the said "temperature element calibration" test had been fraudulently conducted and the results of the test falsified in the manner set forth in paragraph 9 hereof.

All in violation of Title 18, Section 1001 of the United States Code.

COUNT SIX

1. For paragraphs one through eight of this Count, the grand jury incorporates by reference and realleges paragraphs one through eight of Count Five of this Indictment, and the allegations therein.

9. In or about August, 1957, and at the commencement of production of radiosondes under said Contract No. . . . 74678, the defendants put into continuous execution a scheme to evade and circumvent the test procedures established under the Contract for the "pressure element calibration" test referred to in paragraph 5 hereof. In furtherance of said scheme, the defendants caused the signals from the sample radiosondes subjected to this test to be

recorded, not at the pressure gradation points designated under the Contract, but at whatever points would most nearly result in the recording of the signals which the [fol. 21] radiosondes were supposed to transmit at the designated points, and, after the desired signals had been thus recorded on the tapes, caused false notations to be made on the tapes indicating that the signals had been transmitted at the points designated under the Contract, thereby assuring in so far as possible that the records of the test results would not reveal any defects existing in the samples tested.

10. From August, 1957, to November, 1957, at said North Dighton in the District of Massachusetts, the defendants Standard Coil Products Co., Inc., Fong Foo, and Robert Knupp, in a matter within the jurisdiction of an agency of the United States, namely the matter of said Contract No. DA-36-039-SC-74678 and the inspection by the Army Signal Supply Agency of radiosondes delivered to the United States under said Contract, did continuously, and knowingly and willfully, by trick, scheme, and device, cover up and conceal from the government inspector and the Army Signal Supply Agency the material fact that the said "pressure element calibration" test had been fraudulently conducted and the results of the test falsified in the manner set forth in paragraph 9 hereof.

All in violation of Title 18, Section 1001 of the United States Code.

COUNT SEVEN

1. For paragraphs one through eight of this Count, the grand jury incorporates by reference and realleges paragraphs one through eight of Count Five of this Indictment, and the allegations therein.

9. In or about August, 1957, and at the commencement of production of radiosondes under said Contract No. . . . 74678, the defendants put into continuous execution a scheme to evade and circumvent the "humidity element [fol. 22] calibration" test referred to in paragraph 5 hereof, whereby sample radiosondes selected by the government for subjection to said test were secretly pretested and any defects in them cured during the interval between

their selection and their testing under the Contract, the purpose of said scheme being to assure that the test under the Contract would not reveal any defects originally existing in the samples tested.

10. From August, 1957, to November, 1957, at said North Dighton in the District of Massachusetts, the defendants Standard Coil Products Co., Inc., Fong Foo, and Robert Knupp, in a matter within the jurisdiction of an agency of the United States, namely the matter of said Contract No. DA-36-039-SC-74678 and the inspection by the Army Signal Supply Agency of radiosondes delivered to the United States under said Contract, did continuously, and knowingly and willfully, by trick, scheme, and device, cover up and conceal from the government inspector and the Army Signal Supply Agency the material fact that the said "humidity element calibration" test had been falsified in the manner set forth in paragraph 9 hereof.

All in violation of Title 18, Section 1001 of the United States Code.

COUNT EIGHT

1. For paragraphs one through eight of this Count, the grand jury incorporates by reference and realleges paragraphs one through eight of Count Five of this Indictment, and the allegations therein.

9. In or about August, 1957, and at the commencement of production of radiosondes under said Contract No. . . . 74678, the defendants put into continuous execution a scheme to evade and circumvent the "shock" test referred to in paragraph 5 hereof, whereby two tapes were run of [fol. 23] the sample radiosondes selected for testing prior to delivering a shock to said samples, and, in cases where the tapes run after the shock revealed defects, caused the two tapes run before the shock to be submitted to the government inspector with the false representation that one was the "before" tape, and the other, the "after" tape, namely a tape run off after delivery of the shock, the purpose of said scheme being to assure that the records of the test results would not reveal any defects existing in the samples tested.

10. From August, 1957, to November, 1957, at said North Dighton in the District of Massachusetts, the defendants Standard Coil Products Co., Inc., Fong Foo, and Robert Knupp, in a matter within the jurisdiction of an agency of the United States, namely the matter of said Contract No. DA-36-039-SC-74678 and the inspection by the Army Signal Supply Agency of radiosondes delivered to the United States under said Contract, did continuously, and knowingly and willfully, by trick, scheme, and device, cover up and conceal from the government inspector and the Army Signal Supply Agency the material fact that the said "shock" test had been fraudulently conducted and the results of the test falsified in the manner set forth in paragraph 9 hereof.

All in violation of Title 18, Section 1001 of the United States Code.

COUNT NINE

1. (a) On or about May 28, 1956, the defendant Standard Coil Products Co., Inc., a corporation organized under the laws of the State of Illinois, and the United States of America acting by and through the Army Signal Supply Agency (hereinafter sometimes called the Agency) entered into a contract, together with certain contemporaneous modifica- [fol. 24] tions thereof, known as Contract No. DA-36-039-SC-71686, whereby Standard Coil Products Co., Inc., in consideration of $2,365,470.00, agreed to deliver to the United States 25,000 Model AN/AMT-3 radiosondes of a quality set forth in military specifications and standards incorporated by reference in the Contract.

(b) On or about May 6, 1957, said Standard Coil Products Co., Inc. and the United States of America acting by and through the Army Signal Supply Agency entered into a second contract known as Contract No. DA-36-039-SC-74678, whereby Standard Coil Products Co., Inc., in consideration of $1,365,614.00, agreed to deliver to the United States 14,200 Model An/AMT-3 radiosondes of a quality set forth in military specifications and standards incorporated by reference in the Contract.

2. The said radiosondes were devices for the furnishing of weather data, designed to be dropped from airplanes and, while floating to earth by parachute, to continuously transmit in repeated cycles radio signals showing the temperature, pressure, and humidity of the air through which the radiosondès passed.

3. It was provided under the said Contracts that inspection of the radiosondes for conformity with technical contract requirements would be performed at North Dighton, Massachusetts, that such inspection would be under the jurisdiction of the Army Signal Supply Agency, and that the said Contracts would be administered by the said Agency.

4. Pursuant to said Contracts, a government inspector representing the Agency from time to time selected sample radiosondes for testing by Standard Coil Products Co., Inc. Thereupon, Standard Coil Products Co., Inc. employees conducted on said samples certain tests prescribed under the [fol. 25] Contract. The signals transmitted by the said samples in the course of said tests were recorded on tapes, which were submitted by Standard Coil Products Co., Inc. to the government inspector and purported to show the performance of the radiosondes tested and the results of the tests.

5. Among the tests referred to in paragraph 4 hereof conducted by Standard Coil Products Co., Inc. under the Contracts, were the so-called "temperature element calibration," "pressure element calibration," "humidity element calibration," and "shock" tests, designed to test the accuracy of the calibration of the radiosondes, on which the correctness of the radio signals given off depended.

6. The Army Signal Supply Agency, in deciding whether or not to accept radiosondes delivered under said Contracts, relied, as the defendants well knew, on the tests referred to in paragraphs 4 and 5 and on the faithful and honest reporting of test results.

7. The defendant Fong Foo, now of Hollywood, California, was at all times mentioned in this Count employed

by the defendant Standard Coil Products Co., Inc., and was from September, 1956 to April, 1958 employed as Chief of the Quality Control Department of its North Dighton Plant in charge of Standard Coil Products Co., Inc. personnel conducting tests of radiosondes under said Contracts.

8. The defendant Robert Knupp, now of Alhambra, California, was at all times referred to in this Count employed by Standard Coil Products Co., Inc., and was, beginning in September, 1956, employed first as supervisor, and later as foreman in charge of production of radiosondes.

9. In or about September, 1956, and at the commencement of production of radiosondes under said contracts, the defendants conceived and put into continuous execution a [fol. 26] scheme to evade and circumvent the test procedures established under the Contracts for the tests referred to in paragraph 5 hereof. In furtherance of said scheme,—

(a) the defendants, to evade and circumvent the "temperature element calibration" and "pressure element calibration" tests, caused the signals from the sample radiosondes subjected to these tests to be recorded, not at the temperature and pressure gradation points designated under the Contract, but at whatever points would most nearly result in the recording of the signals which the radiosondes were supposed to transmit at the designated points, and, after the desired signals had been thus recorded on the tapes, caused false notations to be made on the tapes indicating that the signals had been transmitted at the points designated under the Contract, and, further, where a sample being tested for temperature signals failed to code at a given point, caused the signals from another sample giving off this code which the silent sample was supposed to transmit, to be recorded on the tape as the signal of the silent sample, and.

(b) the defendants, to evade and circumvent the "humidity element calibration" test, caused sample radiosondes selected by the government inspector for subjection to said test to be secretly pretested and any

defects in them cured during the interval between their selection and their testing under the Contract, and

[fol. 27] (c) the defendants, to evade and circumvent the "shock" test caused two tapes to be run of the sample radiosondes selected for testing prior to delivering a shock to said samples, and, in cases where the tapes run after the shock revealed defects, caused the two tapes to be submitted to the government inspector with the false representation that one was the "before" tape, and the other, the "after" tape, namely a tape run off after delivery of the shock,

(d) the defendants, to further evade and circumvent the foregoing tests, and in cases where the tape recording the radio signals given off during a given test showed a signal other than the signal supposed to be transmitted by the sample tested, caused the code markings on said tapes to be fraudulently changed and altered so as to falsely indicate that a correct signal had been given off, and

(e) the defendants, to further evade and circumvent the foregoing tests, in cases where it was feared that the tests might shortly reveal defects in sample radiosondes already in the process of being tested, caused the tests to be halted on false pretexts and during the grace period thus obtained secretly adjusted the said samples and cured any defects existing therein—

the purpose of said scheme being to assure, in so far as possible, that the records submitted to the government inspector of the test results would not reveal any defects existing in the samples tested.

10. Commencing in September, 1956, and continuing until November, 1957, and at North Dighton, in the District of [fol. 28] Massachusetts, the defendant Standard Coil Products Co., Inc., the defendant Fong Foo, and the defendant Robert Knupp, did knowingly, willfully, unlawfully, and feloniously conspire, combine, confederate and agree together, and with Robert Rosenholm, James Pemberton, Jr.,

Viola Faria, George Faria, Manuel Soares, and Robert Martel, all then employees of Standard Coil Products Co., Inc., who are not indicted herein and are hereinafter designated and called co-conspirators, and with divers other persons to the Grand Jurors unknown, to commit the criminal offense against the United States proscribed in Title 18, United States Code, Section 1001, namely the offense of knowingly, willfully, and continuously, in a matter within the jurisdiction of an agency of the United States, namely the matter of said Contracts Nos. DA-36-039-SC-71686 and DA-36-039-SC-74678 and the inspection by the Army Signal Supply Agency of radiosondes delivered to the United States under said Contracts, by trick, scheme, and device, covering up and concealing from the government inspector and the Army Signal Supply Agency the material fact that the tests of the radiosondes had been fraudulently conducted and falsified in the manner set forth in paragraph 9 hereof.

OVERT ACTS

The following overt acts were among other committed in North Dighton, within the District of Massachusetts, in pursuance and furtherance of said conspiracy and to effect the purposes and objects thereof:

1. At the commencement of testing sample radiosondes produced under the said Contracts at the North Dighton plant, the defendant Robert Knupp did direct and instruct co-conspirators Viola Faria, George Faria, James Pemberton, Jr., and other persons to the Grand Jurors unknown to [fol. 29] conduct the tests which they were charged with running so as to insure that the tapes and other reports of the tests would not reveal any defects which the radiosondes being tested might possess.

2. At the commencement of her testing duties, in the fall of 1956, the defendant Robert Knupp did direct and instruct co-conspirator Viola Faria, in the conducting of the so-called "temperature element calibration" test, to start the recording of the temperature tapes at whatever points would insure that the radiosondes tested would transmit the

signal supposed to be transmitted, rather than starting the tapes at the fixed points prescribed in the test procedures established under the Contracts.

3. When co-conspirator James Pemberton, Jr. commenced his testing duties in the fall of 1956, the defendant Robert Knupp did instruct and direct said James Pemberton, Jr., to start the recording of the tapes of the so-called "cold run pressure element calibration test" at points which would eliminate, or minimize as much as possible, any defects in the radiosondes being so tested, rather than at the points prescribed in the test procedures established under the Contracts.

4. At the commencement of the duties of co-conspirator Manuel Soares as supervisor of calibration of radiosonde units on the night shift in or about January, 1957, the defendant Robert Knupp instructed and directed said Manuel Soares to pre-test radiosondes selected for subjection on the morrow to the so-called "humidity test" and to adjust them so as to insure that they would pass the said test.

5. In or about January, 1957, the defendant Fong Foo, head of the quality control department of the plant, in-
[fol. 30] structed and directed co-conspirator Robert Rosenholm, who was assigned to the quality control department, to follow the instructions and directions of Robert Knupp, foreman in charge of radiosonde production, as to the procedure to be followed in testing radiosondes.

6. In or about February, 1957, the defendant Fong Foo instructed and directed co-conspirator Robert Rosenholm not to inform Allan R. Sawyer, of Attleboro, Massachusetts, foreman (under Fong Foo) of the quality control department and the immediate supervisor of Robert Rosenholm, of what was going on in regard to the testing.

7. In or about June, 1957, Guy Murphy, general foreman in charge of manufacturing at the North Dighton plant, was reassigned by Standard Coil Products Co., Inc., to the Tuner Division of the plant.

8. On May 30, 1957, the defendant Robert Knupp requested David Dingwall, a test equipment technician em-

ployed by Standard Coil Products Co., Inc., to repair certain test equipment which he, Knupp, had been operating.

9. At some time in the summer of 1957, the defendant Robert Knupp requested the said David Dingwall to report to the government inspector that certain test equipment was not working, when in fact, as he, Knupp, well knew, it was working.

10. One evening in September, 1957, the defendant Robert Knupp, with the knowledge and connivance of the defendant Fong Foo, opened the lock of the humidity conditioning chamber in which radiosondes selected by the gov-
[fol. 31] ernment inspector for testing on the morrow were undergoing conditioning and removed the radiosondes for secret pretesting and adjustment.

11. From time to time during the production of the radiosondes, the defendant Robert Knupp prepared notes and memoranda to be used on a future occasion when the defendant Standard Coil Products Co., Inc., would attempt to get rid of the government inspector Constanz Paliotto.

All in violation of Title 18, Section 371, United States Code.

[fol. 32]

A TRUE BILL.

/s/ GEORGE N. HARBOUR
Foreman of the Grand Jury.

/s/ GEORGE C. CANER, JR.
Assistant United States Attorney.

[fol. 33] DISTRICT OF MASSACHUSETTS, January 15, 1960.

Returned into the District Court by the Grand Jurors and filed at 2:12 P.M.

/s/ JOHN F. DAVIS
Deputy Clerk.

[fol. 35]

ATTACHMENT "B" TO PETITION

CR. 60-6-W

THE UNITED STATES

vs.

STANDARD COIL PRODUCTS CO., INC.
FONG FOO, and
ROBERT KNUPP

The offense of knowingly and willfully, by trick, scheme & device cover up & conceal from the government inspector & the Army Supply Agency the material fact that the tests of radiosondes had been fraudulently conducted & the results of the tests were falsified. viol. of 18 U.S.C. 1001, 18 USC 371 (9 counts)

Attorneys for U. S.:

George C. Caner, Jr., Asst. US Atty.

Attorneys for Defendant:

Samuel E. Angoff, Ca 7-3631, 44 School St., Boston (for Fong Foo & Robt. Knupp)

James D. St. Clair, 60 State St., Boston 9 (for company)

Trial 9-6

DATE		PROCEEDINGS
1960		
Jan.	15	Indictment returned
	15	Summons issued to three defendants.
	25	Appearance of Samuel E. Angoff, Esq. for defts. Fong Foo and Robert Knupp filed.

DATE		PROCEEDINGS
1960		
Jan.	25	Wyzanski, J. Deft. corporation appeared and pleaded not guilty by James D. St. Clair, Esq. 21 days to file motions.
	25	Wyzanski, J. Defendant Fong Foo appeared with counsel and pleaded not guilty. Ordered to recog. in the sum of $2500 personal bail Recog. on file. 21 days for motions
	25	Wyzanski, J. Deft. Robert Knupp appeared with counsel and pleaded not guilty. Ordered to recog. in the sum of $2500. personal bail Recog. on file. 21 days for motions.
	26	P/A on behalf of the company filed by James D. St. Clair, Esq.
[fol. 36]		
Feb.	3	Marshal's return of summons with on deft Fong Foo on Jan. 18, 1960 filed
	3	Marshal's return of summons with service on Robert Knupp on Jan. 18, 1960 filed
	3	Motion of Deft Standard Coil Products Co., Inc., for bill of particulars, filed. c/s
	3	Motion of Deft Standard Coil Products Co., Inc., to compel return of documents filed. c/s
	3	Motion of Deft Standard Coil Products Co., Inc., to dismiss indictment filed c/s
	3	Motion of Deft Standard Coil Products Co., Inc., for production of documents filed c/s
	3	Motion of Deft Standard Coil Products Co., Inc., for relief from prejudicial joinder and other relief filed c/s
	12	Motion of deft., Robert Knupp for bill of particulars filed. a/s
	12	Motion of deft., Robert Knupp to dismiss indictment filed a/s

DATE 1960	PROCEEDINGS
Feb. 12	Motion of deft., Robert Knupp for production of documents filed a/s
12	Motion of Fong Foo for bill of particulars filed a/s
Mar. 7	Stenographic transcript of pleas on Jan. 25, 1960 filed.
25	Wyzanski, J. Hearing on motions filed. Briefs filed by the Government and the defendants. Action taken under advisement.
25	Wyzanski, J. Hearing on deft., Standard Coil Products Co. Inc.'s motion for production of Documents—"Par 1 thru 4 Granted other paragraphs denied"
25	Wyzanski, J. Hearing on deft., Standard Coil Products Co. Inc.'s motion to compel return of Documents.—"Motion granted on the understanding that the Government shall have one week in which to photograph or otherwise reproduce the documents."
25	Wyzanski, J. Hearing on deft. Robert Knupp's motion for production of documents. "Paragraphs 1 through 4 and 9 granted. Other paragraphs denied."
30	Wyzanski, J. Hearing on def., Standard Coil Products Co. Inc.'s motion for relief from prejudicial joinder and other relief. "Motion denied.
30	Wyzanski, J. Hearing on def., Standard Coil Products Co. Inc.'s motion to dismiss indictment. "Motion denied."
30	Wyzanski, J. Hearing on deft., Standard Coil Products Co. Inc.'s motion for bill of particulars. "Paragraphs 1 and 2 granted. Paragraphs 3 and 4 denied."

DATE	PROCEEDINGS
1960	
Mar. 30	Wyzanski, J. Hearing on deft. Fong Foo's motion for bill of particulars. "Paragraph 2 granted. The rest of the motion denied."
30	Wyzanski, J. Hearing on deft. Robert Knupp's motion for bill of particulars. "Paragraph 2 granted. The rest of the motion denied."
30	Wyzanski, J. Hearing on deft. Robert Knupp's motion to dismiss Indictment. Motion denied.
Apr. 26	Asst. U.S. Atty. Caner, Samuel E. Angoff, Esq. & James D. St. Clair, Esq. were notified by letter of motions.
[fol. 37]	
June 7	Particulars filed. c/s
July 18	Motion of deft., Fong Foo for further particulars filed
18	Motion to dismiss indictment as to deft. Fong Foo filed
Aug. 30	Wyzanski, J. Hearing on motion to dismiss as to deft. Fong Foo. Motion denied.
30	Wyzanski, J. Hearing on deft. Fong Foo's motion for further particulars. Motion denied.
Sept. 8	Wyzanski, J. Jury impanelled and sworn; trial begins; evidence; motion to quash subpoena Duces Tecum to William Ely allowed after trial
9	Wyzanski, J. Trial continues; evidence;
12	Wyzanski, J. Trial continues; evidence;
13	Wyzanski, J. trial continues; evidence;
14	Wyzanski, J. Trial continues; evidence
16	Wyzanski, J. Trial continued to September 19, 1960 due to illness of foreman
19	Wyzanski, J. Jury trial continues; evidence

DATE	PROCEEDINGS
1960	
Sept. 20	Wyzanski, J. Jury trial continues; evidence; motions for acquittal for each defendant made orally and allowed. Defendants acquitted.
21	Wyzanski, J. "The Defendants, Standard Coil Products Co., Inc., Fong Foo, and Robert Knupp, having been set to the bar to be tried by a jury for the offenses of concealment of material facts and conspiring to conceal material facts in a matter within the jurisdiction of an agency of the United States in violation of 18 U.S.C. 1001 and 371 as charged in 9 counts. and On September 20, 1960 upon the allowance of motions for acquittal made on behalf of each defendant, it is ORDERED that each defendant be, and hereby is, acquitted of the offenses charged, and it is FURTHER ORDERED that each defendant be, and hereby is, discharged." Judgment of acquittal entered. Copies mailed to James D. St. Clair, Esq. 60 State St., Boston and Samuel E. Angoff, Esq., 44 School St., Boston for defts. and to Asst. U. S. Atty. Caner
•••••	
28	Wyzanski, J. On motion to vacate "Judgment of Acquittal" and for Reassignment for trial Motion filed and denied.
28	Certificate of service on motion to vacate filed
•••••	
26	Stenographic record of trial on Sept. 8, 1960 filed. (Vol. I)
26	Stenographic record of trial on Sept. 9, 1960 filed. (Vol. II)

DATE	PROCEEDINGS
1960	
Sept. 26	Stenographic record of trial on Sept. 12, 1960 filed. (Vol. III)
26	Stenographic record of trial on Sept. 13, 1960 filed. (Vol. IV)
[fol. 38]	
26	Stenographic record of trial on Sept. 14, 1960 filed. (Vol. V)
26	Stenographic record of trial on Sept. 19, 1960 filed. (Vol. VI and VII)
26	Stenographic record of trial on Sept. 20, 1960 filed. (Vol. VIII)

[fol. 40]

ATTACHMENT "C" TO PETITION

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

Criminal

No. 60-6-W

UNITED STATES OF AMERICA

v.

STANDARD COIL PRODUCTS CO., INC.,
FONG FOO, and ROBERT KNUPP

PARTICULARS

The Government furnishes herewith the following particulars to the Indictment:

1. The corporation Standard Coil Products Co., Inc. is criminally responsible because of the conduct of its agents

the defendants Fong Foo and Robert Knupp and of the following named persons presently known to the Government, who were also agents of Standard Coil Products Co., Inc.:

George Faria	Robert Martel
Viola Faria	James Pemberton
Berne Fisher	Robert Rosenholm
Donald Graul	Manuel Soares.

2. In the case of Counts One and Five (relating to the temperature tests) the trick, scheme, and device used, and the manner of its use, is set forth in paragraph 9 of each said Count. As stated therein, the defendants caused the operator of the temperature element calibration test, an employee of the defendant Standard Coil Products Co., Inc., to record the signals being tested, not at the temperature gradation points designated under the Contracts, but at whatever points would result in the recording of the signals which the radiosondes were supposed to transmit at the designated points.

[fol. 41] The radiosondes, once put into operation, and as they drift to earth by parachute, are intended to transmit three sets of Morse Code signals continuously, one set of signals reporting temperature, another set reporting pressure, and another set reporting humidity. In the case of an accurate unit, the particular signals being transmitted at any given instant depend on, and report, the temperature, pressure, and humidity of the air at the point through which the unit is passing.

Further elaborating on said paragraph 9, under the temperature test procedure set forth in the Contracts, readings of units being tested were supposed to be taken when the temperature in the test chamber containing the units was stabilized at the points $-50°$, $-30°$, $-10°$, $+10°$, and $+30°$ centigrade, all $\pm 2°C$. Each unit, depending on its calibration, returns a different signal for each of these temperature test points, and the signal each unit is supposed to give off at the different degrees of temperature, including the temperature test points, is set forth on a

calibration chart accompanying each unit. For example, a given unit might be calibrated to return the signal "GS" in Morse Code at −50°C, the signal "LU" at −30°C, the signal "NN" at −10°C, the signal "RK" at +10°C, and the signal "SX" at +30°C. In testing that unit, the operator of the temperature test chamber was supposed to stabilize the temperature of the test chamber at −50°C (±2°C) and record the Morse Code signal the unit was then giving off on tape, noting the temperature on the tape beside the recorded signal, and to repeat the process at −30°C and so forth. If the unit was accurate, it would return the signal "GS" at −50°C, "LU" at −30°C, and so forth.

[fol. 42] Rather than having the temperature test operator follow the procedure prescribed under the Contracts, and permitting it to be honestly ascertained whether or not the unit was accurate, the defendants, however, caused her to adopt a false and fraudulent procedure whereby she would vary the temperature in the test chamber until the unit tested was returning the signal she knew it was supposed to return at the designated test point, would record the signal on the tape, and would falsely mark on the tape that the signal was transmitted at the designated point. Thus, in the example supposed, the test operator would commence her recording of the signal "GS" whenever she heard that signal being returned, whether or not the chamber was then at the temperature −50°C, and whether or not it had been stabilized at that point the required length of time. She would then make the notation −50°C beside the signal, on the tape. The same procedure would be followed at the other designated test points. A tape would thus be produced which would bear on it the signals which the unit was supposed to transmit at the designated points. The signals might, however, have been transmitted, not at the designated temperature points −50°C, −30°C, −10°C, +10°C, and +30°C, but at other points, such as −45°C, −27°C, −9°C, +12°C, and +35°C, a fact which the tape would not reveal. The government inspector to whom such tapes, and test data reports based on them, were delivered was misled by them, as the defendants intended he should be, into thinking that the units tested

were returning the proper signals at the designated test points and he therefore accepted the units tested and the other radiosondes of which the tested units were samples. And thereafter, when the radiosondes in question were [fol. 43] actually used in the field, the operator receiving the "GS" signal would be misled into thinking that the temperature at the point reported from was $-50°C$, whereas in fact it would be $-45°C$.

In the case of Counts Two and Six (relating to the pressure test), the trick, scheme, and device used, and the manner of its use, is set forth in paragraph 9 of each said Count.

With respect to Counts Three and Seven (relating to the humidity test), the trick, scheme, and device used, and the manner of its use, is set forth in paragraph 9 of each said Count.

With respect to Counts Four and Eight (relating to the shock test), the trick, scheme, and device used, and the manner of its use, is set forth in paragraph 9 of each said Count.

During the carrying out of the above tests, the defendants took precautions to assure that the government inspector would not discover the fraudulent testing and falsification of test results. Besides the submission of tapes and test data sheets based thereon which were apparently regular, and did not contain on their face any indication of falsification, these precautions included the running of tests at nights and during Sundays and holidays, and at other times when the government inspector was not present, discontinuing the fraudulent procedure and reverting to the procedure required under the Contracts when the inspector was present and the circumstances were such that he might become suspicious, the maintaining of a watch to give warning of his approach, the substitution of false charts corresponding with signals recorded in tests, the [fol. 44] running of new tapes to replace test tapes which visibly disclosed defects, and the repair and adjustment of units during the testing process at times when the government inspector was not present. With respect to the individual defendants, the defendant Knupp personally par-

ticipated in all the above, and gave instructions to conduct the tests in fraudulent ways. The defendant Fong Foo was personally aware that the fraudulent testing procedure above outlined was being used by his quality control department, failed to disclose the fact to the Government, and participated in concealing the fact from the Government.

ELLIOT L. RICHARDSON
United States Attorney

By: /s/ George C. Caner, Jr.

George C. Caner, Jr.
Assistant U. S. Attorney

CERTIFICATE OF SERVICE

I, George C. Caner, Jr., hereby certify that I have this day served a copy of the above Particulars on the defendants by mailing said copies in franked official envelopes addressed to their respective attorneys of record as follows:

James D. St. Clair, Esq.
Messrs. Hale & Dorr
60 State Street
Boston 9, Massachusetts

Samuel E. Angoff, Esq.
44 School Street
Boston, Massachusetts.

Dated at Boston, Mass., this 7th day of June, 1960.

/s/ George C. Caner, Jr.

George C. Caner, Jr.
Assistant U. S. Attorney

[fol. 46]

ATTACHMENT "D" TO PETITION

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS
Criminal
No. 60-6-W

UNITED STATES OF AMERICA
v.
STANDARD COIL PRODUCTS CO., INC.,
FONG FOO, and ROBERT KNUPP

GOVERNMENT'S TRIAL MEMORANDUM

On the substantive counts, the charge is violation of 18 U.S.C. § 1001 by concealment of a material fact, the first of the three alternative ways of violating that section, to wit:

> "Whoever . . . knowingly and willfully [1] *falsifies, conceals or covers up by any trick, scheme or device a material fact* or [2] makes any false . . . statements or [3] makes or uses any false writing . . . knowing the same to contain any false . . . statement . . . shall be fined . . ." (emphasis added)

The indictment does not charge, and the government's case does not proceed upon any attempt to show that any *particular* tape, test data sheet, submission sheet or other paper is false. Rather, the government will prove that the whole testing procedure was false and fraudulent, necessarily producing false tapes and from them false subsidiary documents, such as the test data and submission sheets, and that the false testing procedure, together with the falsity of the tapes resulting therefrom, a material fact, was concealed from the government.

After explaining the test procedure established under the contracts, the government will call as witnesses those

who actually ran the tests and produced the tapes which, with test data and submission sheets, were delivered to the government inspector.

[fol. 47] These witnesses will testify to the procedure they followed at the instructions of the corporation, through its agent Knupp, and with the knowledge and assistance of Foo.

The testimony of these test operators in substance will be that they ran the tests in such a way as to ensure that the tapes and test data would show no defects, or as few as possible. The manner of the falsification with respect to the temperature test, for example, is set forth in detail in the particulars. It will be seen that where the signals given off were those to be expected, the correct testing procedure was followed, no departure being necessary. It was where the signals transmitted denoted a defective unit that the false procedure was followed.

While it is now impossible to recover the radiosondes tested and to compare them with the tests results and determine which of the tapes, etc. are true and which are false, and while it is also impossible to identify just which radiosondes were secretly pretested to ensure that the test results later to be recorded would be favorable, the testimony of the test operators will show a fraudulent procedure establishing without question that many of the tapes were false, and, further that all the reported test results, as a whole, were permeated with the fraud.

The material fact concealed was this false procedure and the falsification of test results flowing from the false procedure. That the maintenance of honest test procedures is material[1] can hardly be questioned. First of all, an [fol. 48] honest inspection system should catch defective units and furnish a basis for judging the reliability of

[1] "Material" means material to the agency involved. See *United States* v. *Quirk*, 167 F.Supp. 462, 464 (E.D. Pa. 1958) ("test is the intrinsic capabilities of the false statement itself"): *Weinstock* v. *United States*, 231 F.2d 699, 701, 702 (D.C. Cir. 1956) ("test is whether the false statement . . . was capable of influencing the decision of the tribunal in making a determination"). See also *United States* v. *Steiner Plastics Mfg. Co., supra*, 231 F.2d 149.

other radiosondes being produced. Honest inspection results, however, are, or may be important to the agency in other ways. Even when test results show that specifications are being met, the extent to which minimum requirements are shown to be surpassed determines the number of samples to be tested out of subsequent lots. Where test results are apparently excellent, the contractor can obtain "reduced sampling" and save itself time and money in the testing process. And apart from whether or not specifications in these particular contracts were met, the inspection results formed a basis for comparison of the contractor's performance in these instances as against past instances or the performance of other contractors. Thus, the rate of disclosed defects, even if a rate tolerated by specifications, might influence the agency in rating one contractor against another, in deciding whether to negotiate a contract with a given contractor, or, in a later contract, tightening up or relaxing the allowed tolerances. Moreover, awareness of that a purported test is no test at all might well so erode the standards of care exercised by the production personnel that, after a given period of time, units formerly satisfactory might fall below specification limits. Finally, whatever the consequences or lack of consequences flowing from dishonest testing, the government paid for *honest* testing and at the very least when it failed to get that, it was cheated out of the consideration paid for the testing. See *United States* v. *Steiner Plastics Mfg. Co.*, 231 F. 2d 149 (2d Cir. 1956).

Respectfully submitted,

ELLIOT L. RICHARDSON
United States Attorney

By: s/ George C. Caner, Jr.

George C. Caner, Jr.
Assistant U. S. Attorney

[fol. 50]

ATTACHMENT "E" TO PETITION

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

Criminal

No. 60-6-W

UNITED STATES OF AMERICA

vs.

STANDARD COIL PRODUCTS CO., INC.,
FONG FOO, and ROBERT KNUPP

JUDGMENT OF ACQUITTAL

WYZANSKI, J. The defendants, Standard Coil Products Co., Inc., Fong Foo, and Robert Knupp, having been set to the bar to be tried by a jury for the offenses of concealment of material facts and conspiring to conceal material facts in a matter within the jurisdiction of an agency of the United States in violation of 18 U.S.C. 1001 and 371 as charged in 9 counts, and

On September 20, 1960 upon the allowance of motions for acquittal made on behalf of each defendant, it is

ORDERED that each defendant be, and hereby is, acquitted of the offenses charged, and it is

FURTHER ORDERED that each defendant be, and hereby is, discharged.

By the Court,

s/ Miriam M. Wynn
Deputy Clerk.

s/ WYZANSKI
U. S. D. J.

Judgment of Acquittal
entered—September 21, 1960

[fol. 52]

ATTACHMENT "F" TO PETITION

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

Criminal

No. 60-6-W

UNITED STATES OF AMERICA

v.

STANDARD OIL PRODUCTS CO., INC.,
FONG FOO, and ROBERT KNUPP

MOTION TO VACATE "JUDGMENT OF ACQUITTAL" AND FOR REASSIGNMENT FOR TRIAL

The United States of America moves that the Court vacate its "Judgment of Acquittal" entered September 21, 1960 and reassign the above-entitled criminal action for trial.

As grounds for this motion, the United States says:

1. That the action of the Court in allowing motions for acquittal made on behalf of each defendant, ordering that each defendant be acquitted of the offenses charged in said action, and that each defendant be discharged, was beyond the authority of the Court at the stage of the trial then reached, since the evidence to be presented by the government had not closed. As the Court had been advised, the government had not completed its evidence, or called all its witnesses, either as to the case as a whole, or as to the date, which the Court described as "vital," of the Rosenholm-Teichman conversation. As the Court had been advised, only a few of many witnesses to be called by the government had been heard from. In a case charging falsification of tests, none of the principal test operators and only one of the co-conspirators named in the indictment, all of whom (save for the defendants) the government had

subpoenaed and intended to call, had at the time of the Court's action been reached for testimony. The Court was not empowered, at the stage of the trial then reached to [fol. 53] determine that the government's evidence was insufficient to sustain a conviction for the offenses charged.

2. That the Court's order, in so far as it was termed a "judgment of acquittal" was beyond the power of the Court and void, and the legal effect of the order, given its maximum possible scope, amounted to no more than the granting of a motion for mistrial.

3. That the grounds on which the Court relied in terminating the action were insufficient even to justify the granting of a motion for mistrial.

4. That the United States of America has been unjustly deprived of its day in Court.

s/ ELLIOT L. RICHARDSON

ELLIOT L. RICHARDSON
United States Attorney

s/ GEORGE C. CANER, JR.

GEORGE C. CANER, JR.
Assistant United States Attorney

Denied
s/ WYZANSKI, J.

[fol. 55]

IN UNITED STATES COURT OF APPEALS

MINUTE ENTRY OF ORDER GRANTING MOTION OF FONG FOO FOR LEAVE TO INTERVENE—November 4, 1960

Upon motion, Leave is granted to Fong Foo to intervene herein, and to file by November 25, 1960, a brief in typewritten form pursuant to Rule 20 of the Rules of this Court.

By the Court:

Roger A. Stinchfield, Clerk.

[fol. 56]

IN UNITED STATES COURT OF APPEALS

MINUTE ENTRY OF ORDER GRANTING MOTION OF ROBERT KNUPP FOR LEAVE TO INTERVENE—November 4, 1960

Upon motion, Leave is granted to Robert Knupp to intervene herein, and to file by November 25, 1960, a brief in typewritten form pursuant to Rule 20 of the Rules of this Court.

By the Court:

Roger A. Stinchfield, Clerk.

[fol. 58]

IN UNITED STATES COURT OF APPEALS

MINUTE ENTRY OF ORDER GRANTING MOTION OF STANDARD COIL PRODUCTS CO., INC. FOR LEAVE TO INTERVENE—November 14, 1960

Upon motion,

(1) Leave is granted to Standard Coil Products Co., Inc., to intervene herein, to file by November 25, 1960, a brief in typewritten form pursuant to Rule 20 of the Rules of this Court, and to participate in any oral argument that may be had herein, and further

(2) It is ordered that the answer required of the Honorable Charles E. Wyzanski, Jr., United States District Judge for the District of Massachusetts, by order of this Court of November 3, 1960, instead shall be filed by said Standard Coil Products Co., Inc., intervenor, on or before November 25, 1960, Judge Wyzanski having noted his assent thereto.

By the Court:

Roger A. Stinchfield, Clerk.

[fol. 59]

IN UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

Original No. 5755

In the Matter of

UNITED STATES OF AMERICA, Petitioner.

ANSWER TO THE PETITION—Filed November 23, 1960

Standard Coil Products Co., Inc., having been granted leave to intervene and file an answer to the petition on behalf of the Respondent, the Honorable Charles E. Wyzanski, Jr., answers the petition as follows:

1. The Respondent admits the allegations of paragraph 1.

2. The Respondent neither admits nor denies the allegations of paragraph 2, but says that the indictment speaks for itself.

3. The Respondent admits the allegations of paragraph 3.

4. The Respondent admits the allegations of paragraph 4.

5. The Respondent admits the allegations of paragraph 5.

6. The Respondent neither admits nor denies the allegations of paragraph 6, but says that the opening statement of the prosecutor is set forth in the transcript of proceedings and speaks for itself.

[fol. 60] 7. The Respondent admits that the government filed the Trial Memorandum, a copy of which is attached to the petition, and neither admits nor denies the remaining allegations of paragraph 7, but says that the transcript of proceedings and the Trial Memorandum speak for themselves.

8. The Respondent admits that the witnesses Reisburg, Paliatto, Fisher and Rosenholm were called by the government. The Respondent has no knowledge of the purposes for which they were called to testify, other than as appears from the transcript of their testimony. The Respondent admits that Roseholm was called to testify on September 19, 1960, and that the trial recessed on that day with his direct examination unfinished. As to the remaining allegations of paragraph 8 the Respondent neither admits nor denies same, but says that the transcript of proceedings speaks for itself.

9. The Respondent admits that the direct examination of Rosenholm continued on September 20, 1960, and admits that in response to motions for acquittals he directed the jury to return verdicts of acquittal, and admits that on September 21, 1960, the Court entered a judgment of acquittal, a copy of which is attached to the petition; and, as to the remaining allegations of paragraph 9, neither admits nor denies same, but says that the transcript of proceedings speaks for itself.

[fol. 61] 10. The Respondent says that the allegations of paragraph 10 are conclusions of law, but denies same to the extent an answer thereto may be required.

11. The Respondent admits that when the judgment of acquittal was entered the government had not rested but denies that at said time it could not be determined whether the government's evidence would be sufficient to sustain a conviction. As to the other allegations of what took place at trial, the Respondent neither admits nor denies same, but says that the transcript of proceedings speaks for itself. As to the remaining allegations of paragraph 11, the Respondent says that he is without information sufficient to form a belief as to their truth or falsity.

And further answering paragraph 11, the Respondent says that when acquittals of the defendants were directed, the witnesses Paliatto (the resident government inspector under whose supervision the alleged fraudulent testing was conducted) and Rosenholm (a test operator and later a supervisor of testing for the corporate defendant) had demonstrated by their testimony over a period of several

days a complete inability to recount truthfully prior events and circumstances, or even to comprehend the significance and importance of truthful and accurate testimony in a criminal case. The witness Paliatto's marked misuse of [fol. 62] simple English words demonstrated that his testimony was unreliable. The testimony of these witnesses, with respect to matters adverse to the defendants, was in large part false, fabricated and incredible and was highly prejudicial to the defendants. The Respondent gave ample and adequate warning to the witnesses and the government of the grave risks of subjecting the defendants to the possibility of criminal convictions on such false or inaccurate testimony. After hearing the testimony of said witnesses, as it appears in the transcript of proceedings, the Respondent decided that justice required that the defendants be acquitted, and the reasons for said decision are stated in the transcript of proceedings which is incorporated herein by this reference.

12. The Respondent denies the allegations of paragraph 12, and says that the Respondent had the power, right, authority, and duty to order acquittal of the defendants and enter judgment accordingly, in light of all the circumstances.

13. The Respondent admits that the acquittal of the defendants was ordered after motions for acquittal, and denies the remaining allegations of paragraph 13. And further answering paragraph 13, the Respondent says that no motion for mistrial was made; that the Respondent did not intend to declare a mistrial; and that the Respondent [fol. 63] did not declare a mistrial; but that the Respondent intended to, and did, order acquittal of the defendants.

14. The Respondent denies the allegations of paragraph 14.

15. The Respondent admits the allegations of paragraph 15.

16. The Respondent denies the allegations of paragraph 16.

17. The Respondent admits that no remedy other than issuance of a writ of mandamus is available to the peti-

tioner, but further says that such remedy is not available to the petitioner in this Court. Issuance of a writ of mandamus by this Court would not be in the aid of its appellate jurisdiction; no right of appeal exists, and, if it did, the time for filing notice of appeal has expired.

18. The Respondent denies the allegations of paragraph 18. Issuance of a writ of mandamus would not be in the aid of the appellate jurisdiction of this Court. The petitioner has no right of appeal, and petition for writ of mandamus cannot properly be used as a substitute for appeal in this case. The defendants were indicted, pleaded not guilty, were put to trial before a jury, and were duly acquitted; having once been placed in jeopardy, they may [fol. 64] not lawfully be subjected to a second trial for the same offenses. Issuance of a writ of mandamus by this Court is neither necessary nor appropriate; the action taken by the Respondent in the criminal case below was essential to preserve the rights of the defendants and ensure that justice be done. The Respondent had an imperative duty to prevent any unfair and unjust conviction of the defendants, and acted accordingly.

And further answering the allegations of paragraph 18, the Respondent says that he decided, in good faith, after hearing the testimony of the witnesses Paliatto and Rosenholm as it appears in the transcript of proceedings that it would be unfair and unreasonable to expose the defendants to the risk of convictions based in whole or in part upon such testimony, either in the trial then in process or in any subsequent trial. The Respondent determined that acquittal of the defendants was the proper procedure to be followed in the extraordinary circumstances presented, and that acquittal of the defendants was essential to the preservation of justice. The reception of further evidence could not have altered this decision, and would have served no useful purpose in the circumstances.

Wherefore the Respondent prays that the petition for [fol. 65] writ of mandamus be dismissed.

James D. St. Clair, Blair L. Perry, Hale and Dorr, Attorneys for Standard Coil Products Co., Inc., Intervenor.

MINUTE ENTRY OF ARGUMENT—December 8, 1960

Thereafter, on December 8, 1960, this cause came on to be heard and was fully heard by the Court, Honorable Peter Woodbury, Chief Judge, and Honorable John P. Hartigan and Honorable Bailey Aldrich, Circuit Judges, sitting.

[fol. 66]

IN UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 5755, Original

In the Matter of UNITED STATES OF AMERICA, Petitioner.

Petition for a Writ of Mandamus.

Before Woodbury, Chief Judge, and Hartigan and Aldrich, Circuit Judges.

Elliot L. Richardson, United States Attorney, with whom George C. Caner, Jr., and Joseph S. Mitchell, Jr., Assistant U. S. Attorneys, were on brief, for petitioner.

James D. St. Clair, with whom Blair L. Perry and Hale and Dorr were on brief, for Standard Coil Products Co., Inc., intervenor.

Samuel E. Angoff, with whom Grant, Angoff, Goldman & Manning was on brief, for Robert Knupp and Fong Foo, intervenors.

OPINION OF THE COURT—February 2, 1961

WOODBURY, *Chief Judge*. This is a petition by the United States for a writ of mandamus directing a judge of the United States District Court for the District of Massachusetts, and also that District Court, to vacate a "Judgment of Acquittal" entered by the judge in a criminal case, to re-

assign the case for trial, and for such other and further relief as this court may deem just.

A grand jury in the court below returned an indictment in nine counts against Standard Coil Products Co., Inc., an Illinois corporation, which at the time covered by the indictment had a manufacturing plant in North Dighton, Massachusetts, and two individuals then employed by it at that [fol. 67] plant, one as the Chief of its Quality Control Department and the other at first as a supervisor and later as the foreman in charge of the production of certain electronic instruments to be described presently, charging all three with the offenses of concealing material facts and conspiring to conceal material facts in a matter within the jurisdiction of an agency of the United States in violation of Title 18 U.S.C. § 1001 and § 371. More specifically the charges were that from September 1956 to November 1957 the accused had knowingly and wilfully falsified, and conspired between themselves and with others to falsify, tests of radiosondes[1] being manufactured at the time in the plant at North Dighton under two contracts entered into by Standard Coil Products Co., Inc., with the Army Signal Supply Agency.

Motions to dismiss the indictment were denied and the defendants were set to the bar to be tried by jury on their pleas of not guilty.

One of the two Assistant United States Attorneys who represented the Government at the trial made an opening statement to the jury in which he explained the general nature of the charges laid in the indictment and the evidence he proposed to introduce saying that the presentation of the Government's case would fall naturally into two parts, the first part consisting of evidence explanatory of the instruments and of the procedures for testing them and the second part consisting of evidence of deliberate and conniving falsification of the tests on the instru-

[1] These are electronic devices for furnishing weather data designed to be dropped from airplanes in remote places and while floating to earth by parachute to transmit continuous radio signals in Morse Code indicating the temperature, pressure and humidity of the air through which they pass.

ments by the defendants. In carrying out this program the Assistant United States Attorney in charge at the trial [fol. 68] called a witness through whom he introduced the contracts and related documents under which the radiosondes were manufactured by Standard Coil Products Co., Inc. He then called the "Quality Assurance Representative" of the Army Signal Supply Agency who had been stationed at the corporate defendant's North Dighton plant during the time involved for the purpose of supervising the inspection of radiosondes by plant personnel. An examination of the record shows that while this witness was on direct examination he was asked fully as many questions by the judge as by the Assistant United States Attorney. Moreover, the judge on several occasions, both during direct and cross-examination, ridiculed the witness with respect to his use of words, repeatedly corrected his grammar, and many times admonished him to remember that he should be careful in his statements since he was testifying in a criminal case. As the examination of this witness proceeded the questions and sometimes sharp comments of the judge clearly show that he considered the witness's testimony unworthy of belief.

The Assistant United States Attorney next called a witness who briefly identified certain charts to be used by subsequent witnesses as "chalks" and then called a witness to the stand who identified himself as having been the "final inspector of radiosondes" employed by the corporate defendant at its North Dighton plant during the period covered by the indictment.

The direct examination of this witness closely followed the pattern of the direct examination of the government inspector. Toward the end of a day, while still on direct examination, this witness was asked for the date of a conference he had been invited to attend at the plant office with counsel for the corporate defendant. He said at first that he did not remember the date but when pressed for his best recollection he said that he thought the meeting [fol. 69] was early in 1958, he believed in February but was not sure. That is to say, he put the date of the conference after the period covered by the indictment. The next morn-

ing, while still on direct examination, the witness was again asked if he was certain of the date of the conference and he again said he was not. On being asked once more for his best recollection he said, "Approximately September 1957." The judge then asked the witness if he had talked with government counsel while testifying in the case, and the witness saying that he had, the judge remarked that in a criminal case that was not "correct."

A little while later, on cross-examination by counsel for the corporate defendant, the witness admitted that he had changed his testimony as to the date of the meeting as a result of a conference with one of the Assistant United States Attorneys during the preceding over-night recess. The judge then excused the jury and asked the Assistant United States Attorney involved if he wished to make any statement "as a matter of personal privilege." The latter answered that he was unaware of any reason why he should not talk with his own witness during a recess called in the course of the witness's direct examination and expressed astonishment that the judge should think that there was any impropriety in his having done so. The judge then ordered the witness to leave the courtroom and the Assistant United States Attorney, again having expressed ignorance of any impropriety in what he had done, the judge said, "You will very soon learn," and addressed the Assistant United States Attorney as follows:

> "You were here and you knew he was on the stand. You knew there was a recess. You know the principle that a witness must be examined in public. You know that, without suggesting for a moment that you offered any improper inducement, tampering with a witness is one of the most dangerous things in connection with [fol. 70] a case, and particularly a criminal case, that a person should be left entirely alone during the course of his testimony. You must know that elementary fact and elementary rule."

During further colloquy in the same vein the judge said that he did not mean that counsel for the Government were "personally deliberately" doing something they "knew to

be wicked," and that he was not "proposing to take any disciplinary action" against them but was only interested in finding out whether the "situation" was one in which he "must respond to a motion." After more colloquy in the course of which the judge again suggested that the "situation" might require him to act "in response to a motion," counsel for each defendant moved orally for judgment of acquittal. Counsel for the Government strenuously opposed these motions on the ground that the witnesses so far heard were not vital to the case but were primarily intended only to lay the basis for concrete testimony of guilt to follow and that there were many government witnesses in attendance in the courtroom yet to be heard for whose credibility he was ready to vouch. He suggested that the most that should be done would be to strike the testimony of the witness under examination.

At the conclusion of the Assistant United States Attorney's remarks the judge recalled the jury, ordered the witness back to the stand, and opened a statement to the jury as follows:

> "Mr. Foreman and Members of the Jury, before I say anything else, let me make it absolutely clear that counsel for the defendants as well as the Court are persuaded that neither the United States Attorney[2] nor either of his assistants consciously or deliberately [fol. 71] violated any canon with which they were familiar. They were acting subjectively in good faith, and I do not mean at any stage of the remarks I am about to make to criticise them in the sense that I believe that they were conscious wrongdoers."

Following this the judge implied that he considered the Assistant United States Attorney's conference with the witness during recess a serious infringement of the defendants' civil rights and that he regarded the testimony of the two principal witnesses so far produced by the Government to be wholly unworthy of belief, saying that

[2] The United States Attorney himself had joined his two assistants in the courtroom during the course of the trial.

both showed on the stand "a lamentable lack of awareness or lack of capacity in connection with their testimonial obligations" and that the witness then on the stand "has shown either lamentable lack of memory or an extraordinary power of inventiveness."

At the conclusion of his remarks the judge said to the jury that acting in response to the motions for acquittal made by counsel for the individual defendants and the corporate defendant, "I direct you at this stage to return verdicts of acquittal with respect to each of the individuals and with respect to the corporation." The judge then directed the defendants to stand up and announced, "You have been acquitted by direction of the Court and by the Court. Your bail is terminated. You are free." [3]

[fol. 72] We cannot be sure whether the judge directed acquittal of the defendants because he thought the testimony of two of the four witnesses put on by the United States at the outset of the trial was not entitled to belief or because he thought the action of the Assistant United States Attorney in talking with a government witness during a recess called while the witness was on direct examination deprived the defendants of some basic civil right. But whether the judge acted as he did for one reason or for the other, or for both reasons in combination, we think his action was not only plainly erroneous but beyond his jurisdiction.

The testimony of the two principal witnesses to whom we have specifically referred was certainly confused and

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[3] On the next day judgment was entered as follows:

"The Defendants, Standard Coil Products Co., Inc., Fong Foo, and Robert Knupp, having been set to the bar to be tried by a jury for the offenses of concealment of material facts and conspiring to conceal material facts in a matter within the jurisdiction of an agency of the United States in violation of 18 U.S.C. 1001 and 371 as charged in 9 counts, and

On September 20, 1960, upon the allowance of motions for acquittal made on behalf of each defendant, it is

ORDERED that each defendant be, and hereby is, acquitted of the offenses charged, and it is

FURTHER ORDERED that each defendant be, and hereby is, discharged."

conflicting. But, although to an appellate court the record of a trial may be "cold," it can nevertheless be clear; and it is clear from the record before us that the confusion and conflicts in these witnesses' testimony was due in no minor part to the trial judge's persistent, sharp and sometimes caustic cross-examination throughout their direct examination.

It is evident that the memories of the Government's witnesses were not entirely reliable particularly as to details and it is also evident that they were not masters of the English language. But as every lawyer with trial experience knows, the witness whose memory is clear and sharp, who in court is neither over-awed nor cockily over-confident, and who has the capacity clearly to understand the questions asked and the command of language to answer briefly and accurately is indeed a *rara avis*. Cases can only be tried on the testimony of those who have knowledge of the issues, whoever they may happen to be, and all too often, indeed usually, witnesses, coming as they ordinarily do from the body of the general public, neither think nor speak with the clarity and precision of academicians. For the most part witnesses with only average education and [fol. 73] intellectual capacity are the tools with which trial counsel must work as best they can. Moreover, every occupation has its own vernacular. Sailors, doctors, railroad men, engineers, not to omit lawyers, and others too numerous to mention, more or less unconsciously slip into the vocabularies of their callings. Naturally witnesses can and should be required to explain the words they use. It is hardly necessary, however, to do so with ridicule or caustic criticism, or repeatedly to check a witness's use of words in reasonably common use by reference to the Oxford English Dictionary, or to require strict adherence to the rules of grammar. The bench is not an appropriate rostrum from which to teach the niceties of English grammar and usage.

It may well be that solicitude for the essential rights of an accused requires the trial judge to cross-examine government witnesses when an accused with no capacity to protect his rights insists upon conducting his own defense or when an accused is represented by wholly inadequate counsel. No such situation is before us here, how-

ever, for the accused were skillfully represented by able and experienced trial counsel who were very well qualified to preserve their client's every interest. We think it would have been far better had performance of that function been left to counsel. Trial judges must not forget that questions from the bench naturally and properly fall with great impact upon ordinary witnesses and that counsel are reluctant to object to questions asked by a judge for fear of giving offense. There can be no even give and take in court between the judge and counsel for counsel on the floor do not stand on even terms with the judge on the bench.

While performance by the trial judge of his function, indeed duty, to see that the truth is elicited ordinarily requires clarifying questions from the bench, and maybe on occasion sharp warnings, it is not his function or duty to [fol. 74] take the conduct of a case away from counsel. Counsel, as in the case, who sees the examination of his witnesses taken over by the judge and led into matters the witnesses were not intended to cover in their testimony and so opened for cross-examination as to those matters by the other side, finds himself in a most difficult and embarrassing situation. In the first place, it is a delicate matter about which counsel think twice to object to any question asked by a judge. In the second place, if counsel objects to a judge's question on the ground that it leads the witness into matters he was not offered to testify about, counsel runs the risk, exemplified in this case, of comment by the judge before the jury implying that he is seeking to cut off legitimate inquiry. On the other hand, if counsel does not object he soon finds his witness floundering and displaying ignorance and, again as in this case, provoking critical comments by the judge either on the witness's intelligence or on counsel's failure to prepare his case.

We recognize that in the federal courts the trial judge is not relegated to the position of a mere moderator. He has the duty not only to make rulings of law but also to govern the trial to assure its proper conduct. *Quercia* v. *United States*, 289 U.S. 466, 469 (1933). Moreover upon his shoulders rests the duty to see that the trial is conducted with solicitude for the basic and essential right

of the accused. *Glasser* v. *United States*, 315 U.S. 60, 71 (1942). But when the trial judge assumes the role of counsel the adversary system breaks down into confusion worse confounded as the record in this case clearly shows.

This record provides a prime example of the consequences of over zealous participation in the examination of witnesses by the trial judge, for it is clear that the judge's sharp persistent, sometimes almost badgering, questioning and caustic remarks first made the witnesses wary and over cautious and then confused them into incon- [fol. 75] sistencies, and in addition disrupted the orderly presentation of the Government's case according to the plan outlined to the jury by the Assistant United States Attorney by taking its witnesses into matters they were not offered to cover in their testimony. Running cross-examination from the bench, particularly during a witness's direct examination, is an innovation in trial practice which definitely does not have the approval of this court.[4]

We are at a loss to understand the basis for the judge's criticism of the Assistant United States Attorney for talking with a Government witness during a recess. We are not aware of any rule of law, "elementary" or otherwise, or any canon of professional conduct forbidding the practice. Of course, as a matter of trial tactics, counsel ordinarily avoid talking with a witness during a recess called while the witness is on the stand so as not to provide opposing counsel with a point to argue to the jury. But tactics are one thing and rules of law and canons of ethics are quite another. There is nothing wrong that we know of in talking with a witness during intervals in his examination in court. Indeed in *Frazer* v. *United States*, 233 F.2d 1, 2 (C.A. 9, 1956), counsel for the Government was commended for privately reminding a witness of a false statement in her testimony thereby causing her to change her testimony to conform to the truth.

The Assistant United States Attorney was not guilty of any misconduct or impropriety, and even if he had been it

[4] If cases are to be tried by the judge instead of by counsel, the rules of procedure will have to be drastically revised.

would seem that the most the defendants would be entitled to would be an order of mistrial.[5] *Berger* v. *United States*, [fol. 76] 295 U.S. 78 (1935). Moreover, the judge should have allowed the jury to pass on the credibility of the Government's introductory witnesses and allowed the Government to proceed with the presentation of its concrete evidence of the offenses charged. The question remains as to what, if anything, this court can and should do to correct the trial judge's error.

Certainly the judge's error was prejudicial to the United States. But the United States obviously cannot appeal. Nor may it resort to mandamus as a substitute for appeal. The writ is not available "to correct a mere error in the exercise of a conceded judicial power." *De Beers Consolidated Mines, Ltd.* v. *United States*, 325 U.S. 212, 217 (1945). It is available, however, to correct judicial action which is not mere error but usurpation of power, *id.* One of the writ's two traditional uses "both at common law and in the federal courts has been, in appropriate cases, to confine inferior courts to the exercise of their prescribed jurisdiction." *United States Alkali Export Ass'n, Inc.* v. *United States*, 325 U.S. 196, 202 (1945). Therefore the distinction to be drawn is between an error in the exercise of a power conferred and an attempt to exercise a power not possessed.

There can be no doubt of the power of the court under Rule 29(a) of the Federal Rules of Criminal Procedure to order the entry of judgment of acquittal, either on its own motion or on motion of a defendant, as to one or more of the offenses charged in an indictment or information "after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses." In spite of the clear wording of the Rule, perhaps, as the Government concedes, although again we do not need to decide and do not decide, judgment of acquittal

[5] Conceivably, although we have no occasion to decide and do not decide, a judgment of acquittal might be warranted in the event that deliberate misconduct of Government counsel is so outrageous as not only to render the trial in progress unfair but also to make a fair trial in the future impossible.

might properly be entered in some situations even before the close of the Government's case, as, for instance, when [fol. 77] the Government's opening statement unmistakably shows that the evidence it proposes to introduce would not sustain a conviction, or when it produces evidence conclusively showing either that it has no case or that the accused has an iron-clad defense. But there is no suggestion of any such situation here, for the judge abruptly terminated the Government's case by ordering the entry of a judgment of acquittal on evidence showing no defense and long before the Government had had an opportunity to show whether or not it had a case; and, moreover, he did so in ignorance of either the exact nature or the cogency of the specific evidence of guilt which Government's counsel said he had available and was ready to present.

Primarily on the basis of two cases to be cited and discussed presently, we think that under the circumstances of the case before us the judge had no power, that is to say, jurisdiction, to terminate the Government's presentation of its case in mid-course by entering judgment of acquittal and that mandamus lies to correct the error.

In *Ex Parte United States*, 242 U.S. 27 (1916), the Court held that, practice in certain circuits including this one to the contrary notwithstanding, a district judge in the absence of statutory authority had no power permanently to suspend a mandatory minimum sentence of 5 years for bank fraud and that mandamus lay to require the judge to vacate his erroneous order of suspension.

In reaching this conclusion the Court adverted to the consequences of holding to the contrary, that is, of holding that an inherent judicial power could thwart a legislative determination of sentence saying:

> "[I]f it be that the plain legislative command fixing a specific punishment for crime is subject to be permanently set aside by an implied judicial power upon considerations extraneous to the legality of the conviction, it would seem necessarily to follow that there [fol. 78] could likewise be implied a discretionary authority to permanently refuse to try a criminal charge because of the conclusion that a particular act made

> criminal by law ought not to be treated as criminal. And thus it would come to pass that the possession by the judicial department of power to permanently refuse to enforce a law would result in the destruction of the conceded powers of the other departments and hence leave no law to be enforced."

A later case of the same name, *Ex Parte United States*, 287 U.S. 241 (1932), is more nearly in point. In that case the Court issued its writ of mandamus ordering a district judge to issue a bench warrant, which he had refused to do in the purported exercise of his discretion, for the arrest of one under an indictment "fair on its face" returned by a properly constituted grand jury. The case cited is particularly significant in that it shows that issuance of mandamus by this court in the present case would be in aid of our appellate jurisdiction, and also shows the jurisdictional limits of a trial judge's powers in criminal cases and the necessity for issuing the writ to confine trial judges within those limits.

In the first place, since the Court in the case cited above was expressly exercising the original jurisdiction conferred upon it by § 262 of the Judicial Code (the forerunner of present § 1651(a) of Title 28), we, as an intermediate appellate court, can safely rely upon it as direct authority for our issuance of the writ in aid of our appellate jurisdiction. See Chief Judge Magruder's discussion in *In Re Josephson*, 218 F.2d 174, 177-180 (C.A. 1, 1954). If, in spite of the fact that an accused may ultimately be found not guilty, the Supreme Court of the United States, in the exercise of its ultimate discretionary jurisdiction to review actions of the inferior federal courts by certiorari, has power in its discretion to issue mandamus to a federal dis- [fol. 79] trict court ordering the arrest of one properly charged with crime by a grand jury, then this court, in the exercise of its direct appellate jurisdiction, must also have discretionary power to issue mandamus to require a district judge, or court, to permit the United States to at least present its evidence of guilt when an accused properly charged with crime has been brought to trial. There is thus no need for us to consider whether authority to issue

the writ in aid of our jurisdiction might also be found in *Roche* v. *Evaporated Milk Ass'n*, 319 U.S. 21 (1943), or *La Buy* v. *Howes Leather Co.*, 352 U.S. 249 (1957).

In the second place the considerations on which the Court relied in *Ex Parte United States*, 287 U.S. 241, 249-251 (1932), for its conclusion that the district judge did not have jurisdiction to deny the Government's petition for a bench warrant for the arrest of one properly charged with crime support our conclusion that the district judge in the situation before us did not have jurisdiction to prevent the United States from going on with the presentation of its evidence of guilt. We have specific reference to the statement on page 250 that a proper indictment returned by a properly constituted grand jury[6] "conclusively" determined the existence of probable cause for holding the accused to answer to a charge of crime and also to the statement on page 249 that the effect of the refusal of the district court to issue a warrant for the arrest of one charged in "an indictment fair upon its face and properly found and returned is equivalent to a denial of the absolute right of the government, as matters stand, to put the accused on trial. . . . The mere statement discloses the gravity and public importance of the question. It is obvious that if a like attitude should be taken by district courts generally, [fol. 80] serious interference with the prosecution of persons indicted for criminal offenses might result."

These observations, and others we might quote from the same opinion and the cases cited therein, are pertinent here. If, under the circumstances disclosed by the record before us, a district judge for no good reason can halt the presentation of the Government's evidence in a criminal case and enter judgment of acquittal, the action of the grand jury in returning the indictment would be just as much flouted, and the Government fully as frustrated in the performance of its duty to prosecute persons regularly and properly charged with crime as though the judge at the outset had refused to issue a bench warrant for the arrest of the ac-

[6] We can say the same for the indictment in the case at bar. At least there is no suggestion to the contrary and motions to dismiss the indictment were denied by the district judge.

cused. The action of the trial judge in one situation falls as little short of a refusal to permit enforcement of the criminal law as in the other. See id. at page 250. Though the situations are different they are clearly comparable.

The industry of counsel and our own research has unearthed no case squarely in point. But if a trial judge does not have the power to prevent the arrest of anyone properly accused of crime, as held in the later case entitled *Ex Parte United States*, cited above, or to refuse for no valid reason ever to try a criminal charge as indicated in the earlier case of the same name, also cited above, it seems to us to follow that a trial judge has no power arbitrarily to halt the trial of an accused when the government has only begun to present its evidence of guilt. We see no difference in principle between blocking a criminal trial at the threshold and blocking it when the government has barely had a chance to put its toe in the door.

The question of double jeopardy remains for consideration.

Strictly speaking the defense of double jeopardy is not now before us. We can confidently anticipate, however, that the defense will be raised by the defendants by a plea [fol. 51] of *autrefois acquit*, or former acquittal, when they are set to the bar to be tried again. Therefore, since issuance of mandamus, when within our power, is discretionary, and it would be pointless for us to issue the writ if it were a foregone conclusion that the plea of *autrefois acquit* would be good at another trial, it is appropriate here briefly to advert to the defense of double jeopardy. It will suffice for us to say that from our conclusion that the trial judge had no power, that is to say no jurisdiction, to enter judgment of acquittal, it follows under principles too well established to require citation of authorities that the judgment is void—a nullity—and hence affords no basis for the defense of double jeopardy. See *Mitchell* v. *Youell*, 130 F.2d 880 (C.A. 4, 1942).

The United States in its application for mandamus has not specifically asked us to order that the case be reassigned for trial before another judge. Nevertheless we shall do so, for we do not see how a judge who has unnecessarily

taken it upon himself to cross-examine witnesses not only extensively but also sharply can either listen to their testimony reflectively or weigh their testimony dispassionately.

Mandamus will issue directing that the judgment of acquittal entered in United States v. *Standard Coil Products Co., Inc., Fong Foo and Robert Knupp, designated on the Criminal Docket of the United States District Court for the District of Massachusetts as CR. 60-6-W, be vacated and ordering that the above case be reassigned by that court for trial before another judge.*

ALDRICH, *Circuit Judge* (concurring). If I agreed with the court that one could not be sure of the reason why the district court ordered the acquittal I would have to disagree [fol. 82] with its conclusion on the issue of double jeopardy. Since the subject is of some general importance, I will state my reasons.

I cannot think that a court is "without power," that is, "without jurisdiction,"[1] to order an acquittal in the midst of the government's case on the ground that evidence already introduced is so fatally defective that no jury could be allowed to convict. The court assumes, *arguendo*, that it may sometimes be appropriate for a district court to direct an acquittal prior to the closing of the government's case because of some evidentiary defect, but says it is unnecessary to decide. I do not think one can leave this matter hanging, but, rather, I believe its resolution to be all-important.

Not unnaturally, in view of the fact that the government has no general right of appeal, there is a paucity of authority with respect to the right of the court to acquit for evidentiary defects at any preliminary stage. In *United States* v. *Dietrich*, C.C.D.Neb., 1904, 126 Fed. 676, Circuit

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[1] The court apparently uses "power" and "jurisdiction" interchangeably. Certainly there is no question here about the district court's jurisdiction over the case and over the defendants. Accordingly, I will hereafter use the term "power."

Judge (afterwards Mr. Justice) Van Devanter said, at pp. 677-78,

> "Where, by the opening statement for the prosecution in a criminal trial, and after full opportunity for the correction of any ambiguity, error, or omission in the statement, a fact is clearly and deliberately admitted which must necessarily prevent a conviction and require an acquittal, the court may, upon its motion or that of counsel, close the case by directing a verdict for the accused. The court has the same power to act upon such an admission that it would have to act upon the evidence if produced. It would be a waste [fol. 83] of time to listen to evidence of other matters when at the outset a fact is clearly and deliberately admitted which must defeat the prosecution in the end."

I see no reason to say the court there erred in applying this well-recognized civil principle to a criminal proceeding. See *McGuire* v. *United States*, 8 Cir., 1945, 152 F.2d 577, 580. In like manner, in *United States* v. *Maryland Co-operative Milk Producers, Inc.*, D.C.D.C., 1956, 145 F.Supp. 151, an acquittal was ordered when facts were stipulated during the course of the government's case which the court believed precluded any possibility of criminal liability. See also *United States* v. *Weissman*, 1924, 266 U.S. 377, 379.

In the absence of any contrary authority, it seems inherently reasonable to conclude that at whatever stage a fatal deficiency in the government's evidence irrevocably appears, the court is empowered to acquit.[2] Yet it must follow that if the court can make such a decision *in medias res* when its opinion of the damaging effect of particu-

[2] There is some suggestion in the court's opinion that Fed. Rule of Crim. Procedure 29(a), 18 U.S.C., permitting the court to acquit at the close of the government's evidence and allowing the defendant to move at that time without resting, impliedly indicates that the court may not acquit at any earlier stage. The rule contains, however, no positive prohibition to that effect. I believe the rule merely recognizes a common practice, and encourages it by not restricting the right of the defendant to move. See 5 Moore, Federal Practice ¶50.01 [2] (2d ed. 1951).

lar facts is correct, it can equally do so when its interpretation is incorrect. If a court truly lacked jurisdiction, that would be one thing, but given power to decide, there must be power to decide erroneously. Therefore the question must be, was the nature of the ruling that the court made here so different in kind that it must be said that the court was entirely without the power to make it.

There can be no doubt that even if a court found no conceded fact, as in the *Maryland Cooperative* case, fatal to [fol. 84] the government, but nevertheless was of the opinion that the government's evidence was so unreliable and vacillating[3] as to be utterly unworthy of belief, it could order an acquittal at the close of the government's case. The government could not appeal, no matter how erroneous the court's determination. I cannot think that a court is entirely without power to reach the same conclusion before the last witness has testified. It is not always necessary to eat the whole of an egg to know it is rotten. The fact that the court is obliged to put the defendant to the bar, *Ex parte United States*, 1932, 287 U.S. 241, seems a far cry from saying that it cannot, in a bona fide attempt to weigh evidence introduced, conclude that what it holds to be a vital part thereof is so irretrievably bad that no jury could properly convict.[4]

Suppose here that instead of ordering an acquittal forthwith the court had stated that under the circumstances then disclosed all of the remaining evidence offered by the government must be excluded as irrelevant. Manifestly, the power to exclude evidence as irrelevant exists at all times. The government, perforce, would then have rested, and the court's power to acquit would have become absolute. In what way was the court's ruling (if the unreliability of the evidence was its reason for acquittal rather

[3] The district court here (wrongfully, I agree) asserted that the witnesses continually and fundamentally contradicted themselves.

[4] Even accepting in full the government's suggestion that it is entitled to a trial by jury, such trial traditionally includes the right of the court to conclude that the evidence does not warrant submission. See *Patton* v. *United States*, 1929, 281 U.S. 276, 288.

than government counsel's alleged misconduct) other than that evidence already introduced so fatally infected the case that all further evidence was irrelevant in the sense [fol. 85] that it could not cure the defect? To say that this was done without sufficient consideration is not to say that it was done without power. I believe the court has been misled by the relative magnitude of the district court's error into confusing a difference in degree with a difference in kind.

However, I think that a different question is raised by the other possible reason for the acquittal, the conduct of the Assistant U. S. Attorney in speaking to his witness during the recess. Here the court's assumption, *arguendo*, (note 5) is that "a judgment of acquittal might be warranted in the event that deliberate misconduct of Government counsel is so outrageous as not only to render the trial in progress unfair but also to make a fair trial in the future impossible." I find it difficult to imagine circumstances warranting such an assumption. *Cf. Caldwell* v. *United States*, D.C. Cir., 1953, 205 F.2d 879, 881 n.11, *cert. den.*, 349 U.S. 930. But in all events I agree with the court that it is totally inapplicable.

It must be conceded that it was within the power of the district court to determine, however erroneously, that the conduct of counsel was improper. But I do not think it follows automatically that the court had power to acquit for that same reason. "A criminal prosecution is more than a game in which the government may be checkmated and the game lost merely because its officers have not played according to rule." *Maguire* v. *United States*, 1927, 273 U.S. 95, 99. When a court acquits in the middle of the government's case because of what it believes to be an incurable defect in the evidence, it has made a judgment on the government's case as a whole. A ruling of misconduct, however, is only a judgment as to the procedure in the particular trial. What corrective steps the court should take after its determination of a procedural error is a separate question. To make the same assumption that the court makes in its opinion, that "deliberate," "outrageous" mis- [fol. 86] conduct which would project its unfairness into a

future trial would warrant an acquittal forthwith, does not advance the matter, because that is far from our case. The district court made it abundantly clear that the error, as it considered it, committed by the Assistant U. S. Attorney was based upon ignorance of the court's rule,[5] and was anything but deliberate. Nor was any question of prejudice to the defendants possibly involved. The only testimony which the witness had changed as a result of conferring with counsel was the date of a particular conference. The date was a preliminary matter. Nothing about the conference had been admitted in evidence. The present effect of this new testimony upon the trial was nil. Its future effect was entirely in the control of the court, who could exclude any future evidence relating to this as yet undisclosed conference. Prejudice to the defendants was accordingly nonexistent.

Under these circumstances I do not think the court had any more power to order an acquittal than it would have had on the basis of some rule of thumb that more than three government questions, asked in good faith, but regarded by the court as irrelevant, had unduly delayed the trial.

While courts can do, and must be permitted to do, unwise and even foolish things, I think there must be some limit to naked, arbitrary power. As against a defendant's right to be free from double jeopardy, there is the interest of the public in the prosecution and conviction of criminals. See, *e.g.*, *Green* v. *United States*, 1957, 355 U.S. 184, 216-19 (Frankfurter, J., dissenting). In some instances this has been permitted to override what, strictly, is a second jeop- [fol. 87] ardy, or at least an extended jeopardy. *Cf. Wade* v. *Hunter*, 1949, 336 U.S. 684, 688-90; cases collected in *United States* v. *Gori*, 2 Cir., 1960, 282 F.2d 43, 48 (dissenting opinion), *cert. granted* 12/12/60. Whatever may be the correct philosophy of judicial power, I am unwilling to think that such a totally arbitrary act in the course of trial

[5] ...n understandable ignorance, since twice before during the trial the court had expressly invited a government witness to confer with counsel during recess about his testimony, and in one instance to "rehearse it with counsel."

with no semblance of justification behind it,[6] should deprive the government of its day in court. This may be an exceptional ruling, but this is an exceptional case.

Since I think different consequences flow from the two suggested grounds of the district court's acquittal, it is essential to determine, if possible, which one was the actual basis of its action. With all respect, I do not share the court's expressed uncertainty. As soon as it appeared why the witness had changed his testimony the district court excused the jury and asked the Assistant U. S. Attorney, "As a matter of personal privilege do you want to make any statement?" The court stated that in talking to his witness counsel had violated an "elementary rule," and that it was "interested in whether this is a situation in which I must respond to a motion." The court then described counsel's conduct as "a violation of civil liberties." Subsequently the court called the jury, stated that counsel were acting "subjectively in good faith [but that] the standards of a criminal prosecution in the United States require a constant awareness of the rights and liberties guaranteed by the United States Constitution." It is true that thereafter the court mentioned the government witnesses' "lamentable lack of awareness or lack of capacity in connection with their testimonial obligations," and discussed the case generally. But it returned at some [fol. 88] length to counsel's conference with the witness, discussed extorted confessions, unlawful search and seizure, and "the duty of a court to see that every man gets a fair trial," and concluded, "Bearing in mind these principles, and responding to the motions for acquittal made by counsel . . . , I direct you at this stage to return the verdicts of acquittal . . . . "

It may be that the district court would not have conceived of this "elementary rule" if it had not already been annoyed with the believed testimonial deficiencies of the witnesses,

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[6] Unless one wanted to say it was to teach government counsel a lesson for not knowing the rules—which is scarcely a judicial function. It would be doubly inappropriate here in view of the court's prior instructions. See n. 5, *supra*.

but I have no reluctance in concluding that the reason it granted the motions for acquittal was the same one that caused it to invite them—namely, counsel's violation of the "rule." Accordingly, I concur in the judgment of the court.

In United States Court of Appeals

For the First Circuit

Judgment—February 2, 1961

This cause came on to be heard on petition for writ of mandamus and was argued by counsel for petitioner and for intervenors,

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The petition for a writ of mandamus is granted and the writ is hereby issued directing [fol. 89] that the judgment of acquittal entered in United States v. Standard Coil Products Co., Inc., Fong Foo and Robert Knupp, designated on the Criminal Docket of the United States District Court for the District of Massachusetts as Cr. 60-6-W, be vacated and ordering that the above case be reassigned by that court for trial before another judge.

By the Court: Roger A. Stinchfield, Clerk, By Dana H. Gallup, Chief Deputy Clerk.

Approved: Peter Woodbury, Ch. J.

[fol. 91] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 92]

SUPREME COURT OF THE UNITED STATES

No. ....., October Term, 1960

FONG FOO AND ROBERT KNUPP, Petitioners,

v.

UNITED STATES.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI—February 27, 1961

Upon Consideration of the application of counsel for petitioners,

It Is Ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including March 15th, 1961.

Felix Frankfurter, Associate Justice of the Supreme Court of the United States.

Dated this 27th day of February, 1961.

[fol. 93]

SUPREME COURT OF THE UNITED STATES

No. ....., October Term, 1960

STANDARD COIL PRODUCTS CO., INC., Petitioner,

vs.

UNITED STATES.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI—February 28, 1961

Upon Consideration of the application of counsel for petitioner,

It Is Ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including March 15th, 1961.

Felix Frankfurter, Associate Justice of the Supreme Court of the United States.

Dated this 28th day of February, 1961.

[fol. 94]

SUPREME COURT OF THE UNITED STATES

No. 788, October Term, 1960

FONG FOO et al., Petitioners,

vs.

UNITED STATES.

ORDERING ALLOWING CERTIORARI—June 19, 1961

The petition herein for a writ of certiorari to the United States Court of Appeals for the First Circuit is granted.

The case is consolidated with No. 789 and a total of two hours is allowed for oral argument.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 95]

SUPREME COURT OF THE UNITED STATES

No. 789, October Term, 1960

STANDARD COIL PRODUCTS CO., INC., Petitioner,

vs.

UNITED STATES.

ORDERING ALLOWING CERTIORARI—June 19, 1961

The petition herein for a writ of certiorari to the United States Court of Appeals for the First Circuit is granted. The case is consolidated with No. 788 and a total of two hours is allowed for oral argument.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. A]

IN UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MASSACHUSETTS

BOSTON

UNITED STATES,

v.

STANDARD COIL PRODUCTS CO., INC., et al.

Transcript of Hearing—September 8, 1960

[fol. B]

OPENING TO THE JURY BY MR. CANER

Mr. Caner: Ladies and gentlemen of the jury, as the Court has told you, this is a criminal case and, as the Court has told you, the defendants in the case are Mr. Fong Foo, Mr. Knupp and Standard Coil Products Company, Inc., a corporation.

The defendants are charged with violating two federal statutes and, since they are very short, I will read the pertinent portions of those statutes to you.

The first statute with which the defendants are charged with the violation is Section 1001 of Title 18 of the Code, and that statute provides whoever in any matter within the jurisdiction of any department or agency of the United States knowingly and wilfully falsifies, conceals or covers up by any trick, scheme or device a material fact shall be fined or imprisoned or both.

They are also charged with violation of the conspiracy statute, Section 371 of the Code, making it a criminal act if two or more persons conspire either to commit any offense against the United States or to defraud the United States or any agency thereof in any manner or for any purpose and one or more such persons do any act to effect the object of the conspiracy each shall be fined or imprisoned or both.

The gist of that offense is the conspiracy itself and at least one act in pursuance thereof. The gist of the offense

against Section 1001 is the concealment by trick, scheme or [fol. C] device of a material fact in a matter within the jurisdiction of an agency of the United States.

Now, in a nutshell, the defendants in this case are charged with falsifying test results on radiosondes produced for the United States government through its agency, the Army Signal Supply Agency, and with concealing the fact that those tests had been falsified from the United States government. That's the guts of the case.

Now, I am in the process of making an opening. The purpose of my remarks is simply to enable you to better follow the testimony which will be offered, and nothing I say is to be regarded by you as evidence in the case, and the same is true of counsel for the defendants. Nothing they say is evidence in the case.

The evidence will come to you through the oral testimony of witnesses and in the form of any documents that may be introduced. I might say that the same is true of the indictment. The indictment is not evidence in the case, either. It merely sets forth the charge upon which the defendants are tried.

This case necessarily falls into two parts. The first part of it is explanatory. Before you can follow the testimony about the falsification of the tests you will have to know something about the instrument involved, how it was made and how it was to be tested, and the government will introduce evidence of a generally explanatory nature in this area, first of all.

[fol. D] We will put on testimony concerning just what this instrument is and, incidentally, you will hear that this box is merely a transmitter and this is the radiosonde here. You will hear that a radiosonde is a device which is dropped out of an airplane in remote areas where there is no other weather data available; that a parachute then opens and it floats down to earth; and you will hear as it floats down to earth it continuously transmits radio signals in Morse Code, and that an operator listening to the signals and recording them can then make a comparison with a chart which accompanies each unit and draw conclusions as to what the temperature, pressure and humidity of the air are through the points through which the radiosondes pass.

You will hear that this case arises out of the fact that Standard Coil Products Company, Inc. entered into two contracts with the United States government through its agency, the Army Signal Supply Agency, where, under the contracts, the company was to manufacture a large number of these products for the government.

Contracts will be introduced into evidence, both the basic contract documents, two contracts, and the relevant subsidiary documents, one of which will be a document entitled Mil R 11005 B, which contains the specifications which the radiosonde was to live up to, and another document, Mil Standard 105, which sets forth the sampling plan that was [fol. E] to be used in the course of testing these units, for it was not contemplated in the contracts, as you will hear, and it was not done in practice, to test all the radiosondes to be manufactured under these contracts, a total of 39,200 radiosondes. Instead samples were taken. These samples were tested. The samples were put through tests performed by personnel of Standard Coil Products Company, Inc. They ran the tests; the company personnel ran the tests.

The test results which you will hear were recorded on certain tapes, tapes showing the signals that were transmitted at particular points. For example you will hear that in the temperature calibration test which, incidentally, is a test directed at determining whether or not the temperature signals were accurate, and in the course of this test, as you will hear, they would test the signals returned by the sample units at certain specified temperature points, minus 50 degrees Centigrade, minus 30, plus 10, plus 30.

They would secure the signals on tapes at those points. You will hear that these tapes were then turned over to the government's quality representative at the plant. The plant at which these devices were manufactured was in North Dighton, Massachusetts, and the government QAR was there, as you will hear, and received these tapes.

He would examine the tapes, he would analyze them, he would compare the results shown on the tapes with the results which he knew should be obtained by the machine if [fol. F] it was a good unit, and then he could make a determination as to the quality of the unit and his conclusions based on the test tape would also be relevant, as you

will hear in other areas, relevant to the extent of sampling to be performed, whether they should test more samples or fewer samples, and in various other ways.

Also necessarily we will get into some moderately complicated testimony as to what a defect was, under what circumstances units would be rejected. You will hear if a unit is out so many millibars it would be rejected for pressure; out so many degrees, rejected for temperature; out so many degrees, rejected for humidity, and each one of these a separate test.

You will also hear testimony concerning the procedure in running the shock test, so called, and you will hear that the way this test was run was that a tape would be run, first of all, at certain points and that they would then take the unit and they would bring it over to a cable suspended from the ceiling and they would hook it onto the cable, raise it up a bit and drop it and then it would bounce at the end, an effort to simulate the shock which one of these units receives when the parachute opens. Having run that tape before the shock, they would then run the tape after the shock and the results would be compared to see if the shock had destroyed the accuracy of the unit.

And that will pretty much complete the explanatory [fol. G] stage of the case.

When that testimony is in you will have heard how the tests were supposed to be run.

With that background we can turn to the charges of the indictment and what the government will prove was done wrong. Now, the indictment, regrettably, is long. It contains nine counts. Each of these counts contains a number of paragraphs, ten paragraphs, but basically the way it lines up is this: There are two contracts here. The government alleges that there was a false scheme of testing with respect to each one of the tests involved. There were four tests involved, the temperature test, the pressure test, the humidity test and the shock test. The indictment charges that with respect to each one of these tests the tests were falsified, the fact of falsification was concealed from the government representative, and that this was the concealment of a material fact.

Since we have two contracts involved, the first count deals with the falsification of the temperature tests under the first

contract. The second count deals with the falsification of the pressure test under the first contract, and so forth. The fifth count deals with the falsification of the temperature test under the second contract, and so forth. The last count, count 9, is the conspiracy count and it charges that the defendants conspired together to violate the statute I have read, this Section 1001, and sets forth the nature of the [fol. H] conspiracy and various overt acts which were done pursuant to it.

I think that I might confine myself to a reading of two paragraphs of the conspiracy count and from that I think you will get a general idea of the charges of the indictment and again I caution you that the indictment is not evidence and no presumptions one way or the other are to be drawn from the indictment.

Before I get under way, the initial paragraphs of count 9 set forth—identify the defendants. The Judge has summarized that but I perhaps might repeat them, however. The defendant Fong Foo, chief of the quality control department of the plant; the defendant Robert Knupp, employed first as supervisor and later foreman in charge of production of radiosondes.

The indictment describes the device. It refers to the contracts with the long numbers and what not. I will refer to them when necessary as the first contract and second contract and it describes the various calibration tests, the pressure, temperature and humidity which I have just been talking about. Then it alleges [reading from the indictment].

The government, in the course of this trial, will prove each and every element of the indictment, of so much of the indictment as was read to you, and the rest of the indictment.

Particulars to the indictment were requested in this case and the government furnished certain particulars [fol. I] which are part of the papers of the case and I am going to read paragraph 2 of them to you because it sets forth in detail the manner in which it is charged that the temperature calibration test was falsified and it says it better, I think, than I could say it to you now extemporaneously and therefore I will read it to you. [Reading.]

There is other material in the particulars but I will not go into them now.

By way of proof of the falsification charged, the government will call before you the former employees of Standard Coil Products Company, Inc. who ran these tests, who operated the machines which listened to the signals being transmitted and recorded them on tapes. Those people will be brought before you as witnesses after the government has finished the explanatory phase of the case, as I call it.

The government will bring before you also certain government witnesses concerning aspects of the fraudulent falsification charge. The government will introduce evidence of the manner in which the corporation reacted to the charges of falsification and the government will introduce evidence of a variety of things, the significance of which you will see when the evidence is offered and which I don't think I need go into now.

The government will prove in its case that the falsification occurred; that it was within the jurisdiction of an [fol. J] agency of the United States; that it was a falsification of a material fact; that the material fact of the falsification was concealed from the government; and will conclude by proving, I submit to you, every element of the crime charged, and of course it will prove that the falsification was knowledgeable, was wilful, and was known.

That concludes the government's opening.

Reporter's Certificate to foregoing transcript (omitted in printing).

[fol. 1]

IN UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MASSACHUSETTS

Crim. No. 60-6

Wyzanski, D. J. and a Jury

UNITED STATES OF AMERICA,

v.

STANDARD COIL PRODUCTS CO., INC., et al.

Transcript of Hearing—September 8, 1960

Appearances:

George Caner, Esq. and
Joseph Mitchell, Esq.,
for the government

James St. Clair, Esq. and
Samuel Angoff, Esq.,
for the defendants

[fol. 2] (Jury impaneled and sworn.)

(Mr. Caner opens to the Jury in behalf of the Government.)

The Court: Who is your first witness, please?
Mr. Caner: Mr. Herman Reizburg.

HERMAN REIZBURG, Sworn

The Court: Shall we, by agreement, mark as Exhibit 1 this radiosonde which is in front of me? Does either defendant object?
Mr. Angoff: I have no objection.
Mr. St. Clair: I have no objection.
The Court: All right; this is Exhibit 1.

(Radiosonde marked Government's Exhibit 1.)

The Court: Perhaps by agreement I may get a statement from Mr. Reizburg at an appropriate time as to the description of Exhibit 1. Is he a proper person to give it?

Mr. Caner: Mr. Paliotto will demonstrate Exhibit 1. Mr. Reizburg is called to introduce contract documents.

The Court: Oh.

Mr. St. Clair: I don't think there will be any need to call him.

The Court: All right. Let's get the contracts in. What are the contracts? Exhibit 2.

[fol. 3] Mr. Caner: Will you produce the contracts and the modifications thereof?

The Court: Exhibit 2 is a folder of contracts, now to be described, please.

Mr. Caner: There are two contracts, if it please the Court. The first contract and the second contract.

The Court: Exhibit 2 is the first contract. What is the date and the parties?

Mr. Caner: Date is 28 May 1956. The parties are the United States Army Signal Supply Agency and Standard Coil Products Company, Inc.

(Contract between United States Army Signal Supply Agency and Standard Coil Products Company, Inc. dated May 28, 1956, marked Government's Exhibit 2.)

The Court: Can you tell me whether it has a number you are going to use hereafter?

Mr. Caner: It has a contract number. DA-36-039-SC-71686.

The Court: All right. Next contract? Exhibit 3?

Mr. Caner: Just a minute, your Honor. There are five modifications to this contract.

The Court: The five modifications are dated as of what?

Mr. Caner: They have different dates, your Honor. [fol. 4] 28 May.

The Court: Go ahead.

Mr. Caner: The second one is 28 May. The third modification is 28 September. I stand corrected, your Honor; excuse me. The modification No. 1 is dated August 2, 1956; modification No. 2 is dated August 13, 1956; modification No. 3 is dated September 28, 1956; and modification No. 4 is dated December 13, 1956.

The Court: How about No. 5?

Mr. Caner: And No. 5 is dated April 19, 1957.

The Court: Not being a holiday in that part of the country. All right. All five amendments are regarded as part of Exhibit 2. Now Exhibit 3.

Mr. Caner: The second contract is dated 6 May 1957. The parties are United States Army Signal Supply Agency and Standard Coil Products Company, Inc., DA-36-039-SC-74678.

The Court: Are there any amendments to that?

Mr. Caner: Yes.

The Court: What are the dates?

Mr. Caner: Modification No. 1 dated July 27, 1957; modification No. 2, 4 March 1958.

The Court: Is that all?

Mr. Caner: Those are the basic contract documents.

(Contract between United States Army Signal Supply Agency and Standard Coil Products Company, Inc. dated [fol. 5] 6 May 1957, with modifications thereto, marked Government's Exhibit 3.)

The Court: As Exhibit 3 I admit contract of May 6, 1957, together with two amendments. Is there anything else this witness knows?

Mr. Caner: Yes, your Honor.

The Court: Go ahead.

Mr. Caner: It is possibly a point which can be stipulated. I don't know.

The Court: What is the suggestion?

Mr. Caner: He will testify concerning the fact that the Agency and the personnel involved were authorized to enter into this contract so as to make it clear that the matter of the contracts is within the jurisdiction of the Army Signal Supply Agency.

Mr. Angoff: Perfectly all right. It is stipulated.

Mr. St. Clair: On the representation that that is so, I do.

Mr. Caner: I so represent.

The Court: Anything else from this witness?

Mr. Caner: That is all.

The Court: You are excused. Better leave those documents.

Mr. Caner: Those are the original contract files.

[fol. 6] The Court: Nobody wants them?

Mr. Caner: No. He brought them only to show that is where they were kept.

Mr. St. Clair: If your Honor please, do you intend to segregate the witnesses?

The Court: Not in this kind of case, unless you point out some risk.

Mr. St. Clair: I think many of the witnesses are untrained persons and perhaps they should be segregated.

The Court: All right, at the request of defense counsel I will ask that everyone who is going to testify in this case hereafter please be not in the court room before he testifies. When he testifies of course he will be here and thereafter he may be here at his pleasure. Everyone except, of course, the defendants please leave the court room.

Mr. St. Clair: May I have one moment, your Honor?

The Court: Yes.

Mr. St. Clair: I think in connection with Exhibits 2 and 3 there is a portion that should be added entitled General Conditions which I do not find.

The Court: On the General Conditions, Mr. Reizburg, are they a part of the contracts?

The Witness: Yes, they are, sir.

The Court: Will you hand them over, please to Mr. [fol. 7] Caner? The general conditions will be regarded as part of the exhibits as to which they are conditions. I don't know anything about them beyond that. Straighten it out during the recess.

Mr. Caner: They are part of the contracts.

The Court: Is there any doubt about it, the physical documents can be—

Mr. St. Clair: I stand corrected.

The Court: Mr. St. Clair admits they are all right. Will you please swear the witness?

CONSTANZ PALIOTTO, Sworn

Direct examination.

By Mr. Caner:

Q. What is your name, sir?
A. Constanz Paliotto.
Q. Where do you live?
A. 125 Whipple Avenue, Barrington, Rhode Island.
Q. Speak up so everyone can hear you. What is your occupation?
A. Quality assurance representative.

The Court: Is that your title or what you do?
The Witness: That is the title.

Q. What do you do?
A. Inspect electronic equipment for the United States Government.
Q. And you are employed by what agency?
[fol. 8] A. United States Army Signal Supply Agency.
Q. And what were your duties in 1956 and 1957?
A. Inspecting and accepting electronic equipment for the United States Government.
Q. Are you in any particular division of the Army Signal Supply Agency?
A. Yes.
Q. What division?
A. The Quality Assurance Operation Division.
Q. What are the functions of that division generally?
A. It has the responsibility for the inspection and the acceptance of the electron' equipment for the United States Army Signal Suppl. .gency.
Q. For what period of time have you been a government inspector?
A. Approximately ten years.
Q. Have you been charged with the inspection of any particular type of materials?
A. Yes.
Q. What type?
A. Most of it has been electronic equipment.

Q. How many plants, approximately, have you been involved in inspection duties in during this period since 1951?

A. Approximately fifty plants.

Q. During your lifetime have you attended any course of instruction in the electronics field?

[fol. 9] A. Yes.

Q. What?

A. Radio engineering, radio and TV schooling, wire and cable engineering.

Q. Have you taken any correspondence courses?

A. Yes. Correspondence courses put out by the United States Signal Supply Agency through the Fort Monmouth Division relative to electronic equipment and various other equipment.

Q. And have you taken any courses on inspection?

A. Yes.

Q. What courses?

A. Two courses on quality control procedures.

Q. Now, were you ever assigned—

Mr. Angoff: Your Honor, at this time if he is going to qualify him as an expert could he be asked the places where he took these courses?

The Court: Is he to testify as an expert or as somebody who conducted a particular examination on the particular occasion when the crime was committed?

Mr. Caner: Both, your Honor.

The Court: He may testify, of course, with respect to his observations with regard to the alleged crime without being shown as expert but if you are going to be using him as an expert the question put by Mr. Angoff is reasonable.

Mr. Caner: I will not use him as an expert in the sense [fol. 10] there will be any questions put to him as to what is his opinion as an expert on unit quality or things of that sort.

The Court: If you think you are not going to use him as an expert you don't have to put any more questions at this time but later on if you do I will allow a further examination on a voir dire on the expert qualifications of the witness, if any.

Q. Were you ever assigned any duties inspecting materials manufactured by Standard Coil Products?

A. Yes.

Q. What duties were you assigned?

A. Assigned for the inspection and acceptance of the electronic equipment being manufactured for the United States Government.

Q. Where?

A. North Dighton plant, Standard Coil Products, Inc.

Q. What did your duties as quality assurance representative include?

A. The duties included the inspection of the material, making recommendations to the contractor relative to sampling plans and reducing inspection quality assurance plans, supervising other quality assurance representatives, partaking in conferences with the contractor and various contractor personnel relative to inspection matters and problems in engineering relative to the equipment being inspected by the government.

Q. When did your duties begin there?

[fol. 11] A. The duties began the last week in September, 1956.

Q. When did they end?

A. Approximately April, 1958.

Q. Is there any government representative in the plant superior to you?

A. No.

Q. Did you have any subordinates?

A. Yes.

Q. How many at any given time?

A. They vary from one to three.

Q. Any particular subordinate assigned to radiosondes?

A. Yes.

Q. Who?

A. Mr. Harry Brown.

Q. Did you have anything to do with radiosondes yourself?

A. Yes.

Q. What?

A. I also inspected the radiosondes at various stages, supervised the preparation of the inspection on these radio-

sondes and analyzed the various test data submitted to the government inspector by the contractor, evaluated this test data and evaluated on this basis whether the contractor would be put on various sampling plans and also accepted this material for the United States government.

Q. What were your hours?

[fol. 12] A. The hours were 8 to 4.30.

Q. Were you customarily in the plant on weekends and holidays?

A. No, sir.

Q. Were radiosondes the only materials that you inspected at the plant?

A. No, sir.

Q. What other materials did you inspect there?

A. We also inspected camera control units for the United States Army Air Force, oil pressure, water pressure gauges for the United States Army Air Force, various motors for—

The Court: We don't have to go into all these, do we?

Mr. Caner: I don't think so.

The Court: It is enough that he did other things, as well.

Q. Now, while you were at the Standard Coil North Dighton plant did you become familiar with its physical layout?

A. Yes.

Q. How many floors did it have?

A. Two floors.

Q. Generally speaking what was done on the first floor?

A. The first floor consisted of commercial manufacturing which was the tuner division.

Q. Tuner division; right?

A. Right, sir.

Q. What was done on the second floor, generally speaking?

[fol. 13] A. Second floor was the Servotronics division.

The Court: Better define that for the Jury.

Q. For the Jury will you spell the word and tell what Servotronics Division was?

A. Servotronics (spelling). That is a military division

that the contractor had where he manufactured servo motors.

The Court: Don't you define the word even in a technical way? If so, please do so.

The Witness: If there is a technical term, I don't know.

The Court: Don't you know what the word "servo" means?

The Witness: Servo itself, yes.

The Court: What does it mean?

The Witness: It is a form of transmitting power from one section to another through electrical means.

The Court: Is that the best you can do?

The Witness: I will have to go into more detail, sir.

The Court: That's what you better do if you are going to use the term. What does it mean technically?

The Witness: Technically it means transferring an indication from one position to another through electrical means such as motors and radio waves, also on direct contact between the two elements where one element will control the positioning of an element in relation to the position [fol. 14] of the particular element.

The Court: Is the word "tronics" a word which operates by way of imitation of what you have just described?

The Witness: The "tronics" involved in "Servotronics" I think is a name used by the contractor. The terminology I don't know.

The Court: You don't know whether that is a separate name you would find in the dictionary or a trade name used by the defendant?

The Witness: That I couldn't say, sir.

The Court: All right.

Q. How many divisions did the contractor have?

A. Two divisions.

Q. What was the other division called?

A. The Tuner Division.

The Court: That is the first floor; correct?

The Witness: Yes, sir.

The Court: Have we got anything to do with the first floor?

Mr. Caner: No, your Honor.
The Court: All right, let's forget it.

Q. You prepared a chart showing the physical layout of the second floor?
A. Yes, sir.
Q. Does this chart fairly represent the layout of the [fol. 15] second floor while you were at the plant?
A. Yes, sir.

The Court: Is the chart in front of you a fair representation of the second floor layout?
The Witness: Yes, sir.
The Court: All right. Admitted as Exhibit 4, a copy being given to the defendant, one to the Foreman and other members of the Jury, and one to me.

(Chart showing layout of second floor marked Government's Exhibit 4.)

(A brief pause.)

Q. This is a plan of the radiosonde department on the second floor, is it not?
A. Yes, sir.
Q. Is it limited to radiosonde?
A. Yes, sir.
Q. While you were at the Standard Coil plant did you become familiar with what the various personnel in this department did?
A. Yes, sir.
Q. Have you made up a description of what these various personnel did, tied into the chart of the physical layout?
A. Yes, sir.
Q. Does this description accurately summarize the functions of the personnel involved?
A. Yes, sir.

[fol. 16] The Court: Is that part of Exhibit 4?
Mr. Caner: Yes, it is, your Honor. I believe the defense has some objection.
The Court: Is there any real objection?
Mr. St. Clair: If your Honor please, we spent some time yesterday with the United States Attorney and his repre-

sentative going over these. We had comments to make with respect to the description. Some changes have been made, I observe, as a result of those comments. For my part I would not object to it provided we be permitted to cross-examine, perhaps in further explanation of it, and in some parts in derogation.

The Court: Such permission is given and you are not regarded as having agreed to it. You have objected.

Mr. Angoff: I take the same position.

Mr. Caner: I offer it.

The Court: It is received. Without objection I will now receive as Exhibit 1 this model in front of me, this radiosonde, which at some stage I hope will be explained.

Mr. St. Clair: If your Honor please, again interrupting, I think we can agree it is not pretended this is necessarily fully calibrated and intended to be any more than simply a demonstration unit.

The Court: Nobody is going to drop it to see whether it will stand the shock test referred to in the indictment. At [fol. 17] least we hope not.

Q. Now, while you were at the plant did you learn the chain of command which existed in the plant Servotronics Division?

A. Yes, sir.

Q. Have you made a chart or plan setting up that chain of command?

A. Yes, sir.

The Court: Did you show it to the other side?

Mr. Caner: They have seen it.

The Court: Is there any disagreement?

Mr. St. Clair: There is, your Honor.

Mr. Angoff: Your Honor, I am without knowledge.

The Court: Let me just take a look at it.

Mr. St. Clair: I have undertaken to prepare what I understand is the correct chain of command. It is not quite completed. It will be ready tomorrow morning.

The Court: You say there are some errors here?

Mr. St. Clair: Yes.

The Court: I don't think I better receive this now since I think you can agree hereafter. I will reserve for it num-

ber 5 as an exhibit, an agreed upon chart with respect to the chain of command, if you can agree. If you can't agree you can inquire further.

Mr. Angoff: Your Honor, on 4. on the chart, the left-hand corner, the Signal Corps office, which makes me believe [fol. 18] there is more than appears on the chart which should be included in the Servo Department.

The Court: Will you state exactly where that is? At the bottom of the left-hand side? It is correct, is it not, there was a Signal Corps office on the floor which isn't shown on the chart; is that right?

The Witness: Yes, sir.

The Court: Let us have tomorrow an enlargement of the chart to make clear everything that is on the floor so we don't have any argument.

Mr. Mitchell: I understand the defense is going to prepare such a chart. We gave them what we thought was a chart.

The Court: You are going to have a holiday this afternoon. There is nothing better I know of than to get exhibits in order.

Mr. Caner: The government prepared a chart of everything on the floor to which the defense has objected.

The Court: Do you want that?

Mr. Angoff: I will take even that.

The Court: Exhibit 4-A is a chart of everything on the floor. The case can't turn on architectural considerations.

Mr. Angoff: It might.

The Court: Calibration of temperature in the upper atmosphere.

Mr. Angoff: On the second phase of the case, the loca- [fol. 19] tion of his office in relation to the location of the defendants' office may be of major importance.

Mr. St. Clair: I think if Mr. Paliotto were asked he would say this pencil sketch was probably not very accurate and he left it up to the defendants to prepare one which will be ready tomorrow morning.

The Court: I take it 4-A is the chart of the whole floor; correct?

Mr. Caner: If your Honor wishes to so designate it.

This here is the chart—the plan of the Radiosonde Department, simply. This document here to which the defense objects is a plan of the whole floor.

The Court: I understand. Exhibit 4 has been admitted. Exhibit 4-A, which is the government's rather rough drawing of the whole floor, is admitted, but I hope to have, tomorrow or at some appropriate time, a more accurate chart of the whole floor which will be given to the government by the defendant, which will be a supplement to 4-A, or added to 4-A.

Mr. St. Clair: We would like to withdraw 4-A.

The Court: A little later.

Q. Prior to June of 1957 what was the—withdrawn.

Do you know a person by the name of Robert Knupp?

A. Yes, sir.

Q. Prior to June of 1957 what was his job?

Mr. St. Clair: I object.

[fol. 20] The Court: I don't know whether he can testify as to what his job was. He can testify as to what he saw him doing.

Q. What did you see him doing?

A. Supervising the calibration section of the radiosonde line.

Mr. St. Clair: I ask that the answer be stricken as not responsive.

The Court: I suppose it is responsive. You saw him supervising?

The Witness: Yes, sir.

The Court: What does that mean? Did you see him giving orders?

The Witness: Yes, sir.

The Court: To whom?

The Witness: The Standard Coil personnel in that particular area.

Q. And can you point him out in the court room?

A. Yes, sir.

Q. Will you do so?
A. Over there on the last seat.

The Court: Will you stand up, please?

(Defendant Knupp complies.)

The Court: Is that the person whom you designated?
The Witness: Yes, sir.
Mr. Caner: May the record show the witness has iden-
[fol. 21] tified the defendant, Robert Knupp?

Q. Do you know an individual by the name of Fong Foo?
A. Yes, sir.
Q. What did you see him doing at the plant?
A. He visited various lines and come in to discuss quality control matters with me.
Q. Did he ever tell you what his title was?
A. Sure.
Q. What did he tell you what it was?

Mr. St. Clair: Objection.
The Court: Isn't that admissible against him?
Mr. St. Clair: I am objecting on behalf of the corporation.
The Court: I am admitting only against the individual.

A. He says his title was Chief of the Quality Control Department of Standard Coil Products.
Q. Do you see him in the court room?
A. Yes, sir.
Q. Will you point him out, sir?
A. Sitting in the second seat over there.

The Court: Will you please stand?

(Defendant Fong complies.)

Mr. Caner: May the record show that the defendant Fong Foo has been identified by the witness?

[fol. 22] Q. Did you know a person by the name of Berne Fischer?
A. Yes, sir.
Q. And who is he?

Mr. St. Clair: That is another way of asking an inadmissible question.

The Court: I think you may tell us where you saw him. Where did you see him?

The Witness: I have seen him in the plant manager's office, sitting in the plant manager's office.

The Court: What did you see him doing there?

The Witness: I couldn't say what exactly he was doing.

The Court: Did he answer the telephone?

The Witness: Yes, sir.

The Court: What else did you see him doing?

The Witness: He also told me that he was the plant manager.

The Court: That is struck. That is just what I don't want you to tell us. I asked you what you saw him do. You can tell us everything you saw him do, since they make a point of it. You can tell us everything you saw him do, if you really want to make a point of it, Mr. St. Clair. Do you?

Mr. St. Clair: We are doing all right for the moment. If he can answer this question I will have no objection.

The Court: What did you see him do?

The Witness: He toured the radiosonde lines. He gave [fol. 23] orders on what he wanted done.

The Court: Did he sign contracts in your presence?

The Witness: No, sir.

The Court: Did he sign any other documents in your presence?

The Witness: Not in my presence, sir.

The Court: Did you see him give instructions with respect to pay?

The Witness: No, sir.

The Court: What did you see him give instructions with respect to? Never mind whether they were true or not. What did you see him do?

The Witness: He gave instructions to the personnel on the radiosonde line and the various other lines relative to getting the material out and what should be done and so forth and so on.

The Court: Did you see anybody give him instructions?

The Witness: No, si.

Q. At the time that you were at the plant did the company have a quality control department?

A. Yes, sir.

Q. Were you ever advised by anyone who the head of the quality control department was?

A. Yes, sir.

Q. Who advised you?

[fol. 24] A. The various personnel—

The Court: No. Names, please.

A. Bob or Robert Reneirs.

The Court: Will you spell the name?

(The witness complies.)

The Court: He told you. Who else told you?

The Witness: Mr. Fong Foo himself and Mr. Don Graul.

Q. Were Reneirs and Graul employees of Standard Coil?

A. Yes, sir.

Q. Where did they give you this information?

A. On my initial visit at their office which was down on the first floor of the building.

Q. What was told you?

A. That—what the Servotronics Division would be consisted of and the individuals I would be dealing with.

Q. Were you told who the head of the Quality Control Department was?

A. Yes.

Q. And who were you told it was?

A. Mr. Fong Foo.

Q. While you were at the plant did you learn what the functions of the Quality Control Department of the company were?

A. Yes, sir.

Q. What were its functions?

Mr. St. Clair: I object to that.

[fol. 25] The Court: What did he observe being done is all he can say.

Q. What did you observe that department doing?

A. Doing inspection on various lines.
Q. On the radiosondes?
A. On the radiosondes and other units such as motors, generators—

The Court: Let's not get into those.

Q. Is it customary, in your experience, to have such departments in other plants?

Mr. St. Clair: I object.
The Court: I don't see what that has to do with the case.
Mr. Caner: Withdrawn.

Q. Did you observe as to whether or not the department had its own employees?
A. Yes, sir.
Q. What did you observe?
A. The quality control had quite a few employees who were responsible—

The Court: Don't use words like "responsible." You can tell us only what you saw. No legal conclusions, please.
The Witness: These individuals were given orders by Mr. Fong Foo and Mr. Allen Sawyer, who was the foreman of the quality control department.

Q. Did you see any employees doing quality control [fol. 26] work who were not members of the quality control department?
A. Yes, sir.
Q. And who did you see?
A. Production personnel on the radiosonde line.

The Court: Production personnel of what?
The Witness: On the radiosonde line.

Q. By whom were they supervised?
A. By Mr. Robert Knupp.
Q. When you came to the plant did the company appoint any particular person with whom you were—you personally were supposed to deal?
A. Yes, sir.

Q. Who was appointed?

A. Mr. Fong Foo.

Q. Will you tell us what this radiosonde is?

A. Radiosonde is an instrument used by the Air Force to obtain data on weather in areas which are inaccessible to the people involved, notably over mountains, oceans, vast areas of the Antarctic or Arctic. The data from the radiosonde is used by the Air Force to formulate a weather pattern which is used in conjunction with various duties of the Air Force or related services which require this data. The radiosonde in itself consists of various components. The major components are the parachute—

The Court: Is the parachute part of Exhibit 1?

[fol. 27] The Witness: Yes, sir.

The Court: It is inside the box?

The Witness: Yes, sir. The bronze section contains the parachute and the parachute ejection mechanism.

The Court: We have all heard about parachute ejection mechanisms recently. Go ahead.

The Witness: The silver colored box contains a sensor unit or the radiosonde proper.

Q. You are referring to this second—

The Court: You can step down if it will help, take the pointer.

Mr. St. Clair: If your Honor please, if it is not my function to assist the United States Attorney, I have a broken down sensor unit.

The Court: We will mark it Exhibit 1-A.

Mr. St. Clair: I tender it to the cause.

The Court: Thank you. Exhibit 1-A is what you call a broken down unit. The government will call it something else.

(Broken down sensor unit marked Government's Exhibit 1-A.)

The Witness: The top half is a parachute and this is the parachute ejector assembly. This section contains the batteries and also contains the chart that is shipped with the unit. These batteries are not the regular batteries for

[fol. 28] the unit, we were not able to procure the regular batteries, but if they had, these leads would be in here along with the chart and there would be a cover. This part is the sensor, this unit here.

The Court: Now pointing to Exhibit 1-A.

The Witness: This unit consists of various sections. We have in the back a transmitter which is continuously transmitting a signal. We have the various controls such as the switch to turn the transmitter and the motor on and off. Here we have a motor which rotates and has a disc or a record which has on it imposed code groups.

The Court: I am going to interrupt for now. I assume there will be a little more description of this which will take time and the Jury is entitled to be excused until ten o'clock tomorrow, but before I declare a recess, Mr. Caner, you have a matter involving Toto's, receivership, at two o'clock?

Mr. Caner: Yes, your Honor. Fifteen minutes.

The Court: And then at 2.15 I could deal with your motion in this case, if that is agreeable to you and Mr. St. Clair.

Mr. St. Clair: That's fine with me.

The Court: Then we will take a recess of the Court until two o'clock and a recess as far as the Jury is concerned until ten o'clock tomorrow morning.

(Luncheon recess.)

[fol. 29]

SECOND DAY

Court Room No. 6
Federal Building, Boston
September 9, 1960

COLLOQUY BETWEEN COURT AND COUNSEL

Mr. Angoff: Your Honor—

Mr. Caner: We both—

The Court: You made a speech last night. Suppose you give the others a chance first.

Mr. Caner: May we approach the bench, your Honor?

The Court: Did you want to introduce someone?

Mr. Angoff: Mr. Robert Weihrauch of my office.

The Court: Very glad to have you, sir.

(Conference at the bench:

Mr. Caner: The tube is blown on the device so we sent for another one.

Mr. St. Clair: I have a whole new device in my office.

Mr. Caner: I have one downstairs.

The Court: How did that happen? Through carelessness on the part of somebody?

Mr. Caner: I don't think it is anybody's fault. There was a short during the time I was making my opening.

The Court: Nobody can be blamed for that.

Mr. Caner: Another thing, the government is introduc- [fol. 30] ing Mr. Paliotto at the moment as a exploratory witness.

The Court: You don't want the cross-examination on the merits of the case at this moment, in other words.

Mr. Caner: We would like to bring him back.

The Court: It is understood he will be available later, but at this stage there will be no interference on the technical background rather than the details.

Mr. Angoff: He will be back?

The Court: Yes.

Mr. St. Clair: Are we entitled to cross-examine on the technical—

The Court: Absolutely, but the cross-examination will be limited to that at this stage.

Mr. St. Clair: Along this same line I have an expert, too. Yesterday I suggested, and your Honor complied with the suggestion of segregation of witnesses. I had in mind mostly untrained people.

Mr. Caner: If the Court please, this particular expert is one of the people named as a co-conspirator.

[fol. 31] Mr. St. Clair: He is the chief engineer.

The Court: I think you asked for the rule and now you have it. I never would have prescribed it without your request, but you did.

Mr. Angoff: I did not intend to duplicate experts on technical matters.

The Court: May I congratulate you.

Mr. St. Clair: I think I will have Mr. Graul stay in the

court room and I think, therefore, he will not be subject to call for the government.

The Court: You cannot accomplish that end. They can call him. But you leave him in the court room you cannot call him.

Mr. St. Clair: Then they should ask him to leave now.

The Court: He is not here under subpoena by them. It is entirely up to you.

Mr. St. Clair: I am going to have to have them in the court room. I am not smart enough to follow this one myself.)

The Court: You may proceed, Mr. Caner. We had a witness testifying with respect to Exhibit 1 and Exhibit 1-A and I think you better continue unless you have some reason for him not to.

[fol. 32] Mr. Caner: I just want to offer at this time a certificate of incorporation of Standard Coil Products Company.

The Court: No one doubts its incorporation. Let's not litter up the record. Is it agreed it was incorporated at all relevant times?

Mr. St. Clair: Yes, sir. I informed Mr. Mitchell yesterday.

The Court: In what State was it incorporated?

Mr. St. Clair: Illinois.

Mr. Caner: Mr. Paliotto.

CONSTANZ PALIOTTO, Resumed

Direct examination.

By Mr. Caner, Continued:

Q. You told us, sir, yesterday just before we suspended that the radiosondes were dropped from airplanes, descended to earth by parachute. Can you tell us whether they were dropped singly or in groups?

Mr. Angoff: I object.

The Court: I can't imagine why you object or why it is relevant.

Mr. Angoff: I don't think he dropped them.

Mr. Caner: Its relevance will appear later on.

The Court: Have you seen them on occasion being dropped; Yes or No?

[fol. 33] The Witness: Yes, sir.

The Court: When you saw them were several dropped in succession or simultaneously or only one dropped?

The Witness: Only one, sir.

Q. How far a distance will the radiosondes transmit?

A. Approximately 50 miles and up.

Q. Are they on the same wave length?

The Court: I suppose you mean more than 50 miles. Not 50 miles and up.

The Witness: Yes, sir. I didn't get that last question.

Q. Are they on the same or different wave lengths?

A. They are all on the same wave length.

Q. Is there any one limiting factor as to how close together the radiosondes can be dropped?

A. Yes.

Q. What is it?

A. If the first radiosonde dropped is still transmitting, then the operator would be required to wait until the transmission had ceased on that unit before he commenced sending the other unit down with its transmission.

Mr. Caner: Now, if the Court please, Mr. Sheppard has returned to the court room with the tube.

The Court: If he wants to come up and fool with the tube, all right.

[fol. 34] Mr. Caner: Shall I proceed?

The Court: Yes. As long as it doesn't explode in the court room everything is all right.

Q. During the time that you were at the plant, Mr. Paliotto, did you become familiar with the chain of command at the plant?

A. Yes, sir.

Q. Have you made any chart of the chain of command at the plant?

A. Yes, sir.

Q. I show you these two papers and ask you if you can identify them?

A. Yes, sir.

Q. Do they accurately represent the chain of command at the plant?

A. Fairly accurate, sir.

Mr. St. Clair: I will object to the question.

The Court: It is just a summary of what he would say on direct and you can cross-examine him.

Mr. St. Clair: We had prepared, as I suggested, another one.

The Court: You like your testimony better and Mr. Caner likes his better. Do you really want to have this all by word of mouth instead of a chart? You have a right to cross-examine and show the chart is faulty or in some way improper.

Mr. St. Clair: I object to this particular offer since the witness said it is fairly accurate. It is either accurate or not accurate.

[fol. 35] The Court: That would be a dreadful test in the law. Nothing would get by. "Fairly accurate" I think is enough for the present purposes. Do you know anything in it that is wrong?

The Witness: No, sir.

The Court: Is it based on your personal observation?

The Witness: Yes, sir.

The Court: I admit it.

Mr. St. Clair: Note my objection for the record, please.

The Court: Yes. I will hold you to it if you suggest nothing less than complete accuracy; is that what you want?

Mr. St. Clair: No, I don't want to have to live with that one.

The Court: All right; this will be Exhibit 5. Admitted.

(Charts showing chain of command marked Government's Exhibit No. 5.)

Q. Now, Mr. Paliotto, just before we suspended you were describing the various components of the radiosonde. Will you take the position you had assumed—

The Court: You may have your pointer. Remember to stand so that you don't block the view of the jury.

A. (Complying.)

Q. I had asked you, I believe, to demonstrate how the radiosonde works. At the moment it isn't working but we are about to substitute another one which we trust will [fol. 36] work. I ask if you would continue your exposition.

A. When I started yesterday I pointed out the fact that this unit contained a motor on this side which rotated the disk, or the record, as it is sometimes called. On this record is imposed code groups in regular International Morse Code groups such as A, AA, AB and so forth. In this area here we have—

The Court: By the way, when you say "this," for the sake of the record try to describe the word "this" so that an appellate court judge who doesn't see you but only reads what you say can understand what you are saying.

The Witness: Yes, sir. Operating across when this disk is rotating are three pickup arms that is equivalent to something like a record player. When the record is rotating the arms are picking up the signal. There are three of them. Two picked up the signals being transmitted by the three elements, the pressure element, the temperature element and the humidity element. This element here, bellows or diaphragms, is responsive to the change of atmospheric condition wherein they will contract or expand and that in turn is linked to a pickup arm.

The Court: Can you point out that pickup arm?

The Witness: It is hidden, sir, up in the back.

The Court: Will you step a little closer to the jury and show them where it is?

The Witness: These are the pickup arms here. They [fol. 37] have a little needle called a stylus. There is one in here for the pressure and one in here for the humidity.

Mr. St. Clair: Why don't you take that card off the front?

The Court: That is a tag that says Exhibit 1-A. You better leave it on. Mr. Duwan will put it somewhere else later. Do you want it in a hole in the leg?

Mr. St. Clair: That would be a fine idea.

The Court: All right.

(Mr. St. Clair adjusts the exhibit marking.)

The Witness: These pickup arms being, picking up the signal of the record player or disk as it is rotating will interrupt the signal being transmitted by this transmitter and the signal being interrupted is being sent out through the air waves, being picked up by the receiver in the aircraft. This link here is the pressure bellows. The bottom here contains the temperature element, the two dissimilar metals, these two black objects here are the temperature elements subjected to a change, contraction and expansion in the change of temperature.

This screw is a set screw which adjusts the unit to the calibration point that is required. Once that is calibrated it is left alone and is set. That temperature element has linked with it a pickup arm and any expansion or contraction will move the pickup arm across the record.

This segment here contains the humidity elements. We [fol. 38] don't have them here right now but we do have on that unit the humidity element. I would like to show it to you so that you will know what it is.

(Discussion off the record.)

The Witness: This element is the humidity element which consists of human hair which is subject to the humidity in the atmosphere. Having an effect on the hair will either expand or contract it. That is suspended across here. This is your set screw where the unit is set and there is glyptal; in other words it is locked.

The Court: Will you spell that?

(The witness complies.)

The Court: What is that, please?

The Witness: That is a form of varnish substance which, after it is dried, forms a seal between the two movable objects.

The Court: Is that the trade name for some compound?

The Witness: It is a universal trade name for the substance itself, used and manufactured by various manufacturers.

The Court: It is, in short, a market name for a chemical widely sold?

The Witness: Yes.

The Court: We don't have to know anything about it in detail, do we?

The Witness: Not necessarily. You can refer to it as [fol. 39] varnish if you want.

The Court: All right.

The Witness: Up here we have the suspension which is linked to the pickup arm and that arm in turn, subject to the humidity, is being traversed across the disk or the record and is picking up the code signal and transmitting the same through the atmosphere.

The Court: What are you going to do? Substitute the new for the old Exhibit 1? All right.

The Witness: This instrument in the operation, after it is launched, will transmit three signals. The first signal transmitted will be the pressure; the second signal transmitted will be the temperature; and the third signal being transmitted will be the humidity.

The record or the disk is so made that approximately 90 per cent of it is being used for transmission. The balance of the record is what we call an off period as far as transmission goes. That is to properly space the signal so that the operator knows which signal is being transmitted.

Q. You mean by an off period a gap between the signals?

A. Yes.

Mr. St. Clair: Did you say 90 per cent?

The Court: He said 90 per cent was being utilized, and pauses or rests in between account for 10 per cent of the record; is that right?

[fol. 40] The Witness: I meant to say 90 degrees.

The Court: Now you will have to tell us what you mean by 90 degrees. We understand percentage but degrees is rather a difficult concept.

The Witness: A circle of the disk is 360—

The Court: You mean a quarter of it. Twenty-five per cent?

The Witness: A quarter, sir. Also under bellows is an adjustment screw where they adjust the bellows for the calibration. They adjust it at 990 millibars point and they set that and it is left alone. In the initial part we have to calibrate—

The Court: You better define the word "calibrate" for the jury.

The Witness: The word "calibrate" is to adjust the unit to a certain reading to correlate with the reading on the chart at a specific point, namely on pressure with 990 millibars—

The Court: Now, they don't necessarily know what a millibar is. What is a millibar?

The Witness: Millibar is a term used to indicate a displacement of a column of mercury. We have another term for it which is used by the Weather Bureau and that is pounds pressure which is, in essence, a column of mercury and this mercury will be moving up and down in re-
[fol. 41] lationship to the pressure existing in the atmosphere.

The Court: In other words it is like the thermometer which you see outside your window, is it, or not?

The Witness: Yes, sir.

The Court: Now please talk in terms which those of us who haven't had physics for 30 years can understand. Physics has changed in 30 years. Not, I agree, with respect to this particular aspect, to pounds of pressure of mercury.

Mr. Angoff: Your Honor, may we have read back the definition of calibration?

The Court: Yes. He hasn't finished it yet but you may have it read.

(The reporter complies.)

The Court: Have you ever been a teacher?

The Witness: No, sir.

The Court: Have you ever tried a job of exposition to unlearned people?

The Witness: I have had trouble before, sir, on it.

The Court: Well, just assume we are about the equivalent of 14 year old boys in school who understand the English language and know some things but not much in the area of common sense with respect to physical, chemical and like matters. Use language which you would think a 14 year old boy who is reasonably alert and intelligent would understand and whenever you get to a term you think a 14 year old boy wouldn't understand, just assume [fol. 42] one of us is near that moronic level.

The Witness: Continuing further, this adjustment on the temperature element is made at the point Code SX.

The Court: What does Code SX mean?

The Witness: Code group—

The Court: What does code group mean?

The Witness: It is the Morse Code Signal being transmitted by this unit.

The Court: Is Code SX—

The Witness: Code group SX.

The Court: Is code group SX a technical term well known in the profession?

The Witness: No, it is the letters S and X being transmitted.

Mr. Caner: I think I might be able to help at this stage.

The Court: I think you better.

Q. Will you explain the functions of the calibration chart which accompanies the unit?

The Court: We will have the chart marked Exhibit 6 for Identification. What is it called, Mr. Caner?

Mr. Caner: It is called calibration chart and it can be distinguished from other charts by the fact that its initials are 58 GX.

The Court: I see it says Signal Corps United States [fol. 43] Army Radiosonde AN/AMT/F and I would like to know what AN means.

The Witness: That is the terminology used by the military service. It means Army and Navy.

The Court: Slash AMT/3; what does that mean?

The Witness: Air meteorological equipment.

The Court: T means equipment?

The Witness: No. Transportable.

The Court: I see initials 58 GN. What does that mean?

The Witness: The contractor had a variety of charts with all different readings which he assigned for his practical use code groups to denoting to him just what chart would go with what unit.

The Court: GN doesn't mean gynecological. What does it mean?

The Witness: Morse Code group.

The Court: Is that an international symbol for some kind of signalling by telegraph of other communication means?

The Witness: The GN used in Morse Code is international in communication.

The Court: Is it one which is used in international usage to indicate something equivalent to the simple Morse Code, dot dash, A, dash and three dots, B; is that the sort of thing?

[fol. 44] The Witness: Yes.

Q. Is this chart a fair example of the charts which appear in these radiosondes?

A. Yes, sir.

Mr. Caner: The government offers this chart as its next exhibit.

The Court: I don't suppose there is any objection?

Mr. Angoff: I just want to see it on the front side.

The Court: Frankly I don't understand it.

Mr. Angoff: I studied it all summer and I don't. All right.

The Court: Exhibit 6 is admitted.

(Calibration chart marked Government's Exhibit 6.)

The Court: Now tell us what Mr. Angoff didn't understand in the whole summer.

Mr. St. Clair: I had a group made up so that the jury

may follow them but I don't know exactly where they are. We can proceed with this.

The Court: It has got a lot of numbers and columns. I don't understand anything about it.

Q. Are the charts different or the same with respect to each unit manufactured?

A. The biggest percentage of the charts are different.

The Court: Just a second. The question is is a dif-
[fol. 45] ferent chart for each unit appropriate?

The Witness: A different chart is appropriate for each unit.

The Court: So that when you substituted a new Exhibit No. 1 for the old Exhibit No. 1 the old No. 1 would not use the same chart as the new No. 1?

The Witness: Right, sir.

The Court: By the way, does this chart go with old Exhibit No. 1 or new Exhibit No. 1, or neither?

Mr. Caner: This chart goes with neither. It is merely intended as a sample chart for the basis of explanation.

Q. Now will you tell us what the various columns mean on that chart?

A. The first column is the letters of the International Morse Code which are imposed upon this disk. The second column—

Q. You mean that the unit will be transmitting these signals in the first column?

A. Yes, sir.

The Court: Mr. Caner, my eyes, I think, are of average quality and I am having difficulty and I guess some members of the jury are having difficulty, in fact they nod their heads, and they can't see it. Haven't you got some photocopies of the chart?

Mr. Caner: The best we could do would be to give them sample charts.

[fol. 46] The Court: Do that because we are not relying on particular figures but the type of chart.

Mr. Caner: The symbols on this sample chart which I have just given to the Foreman and which is taken from the

former Exhibit A contains different symbols but the idea, nevertheless, is the same.

The Court: You are not relying on the particular symbols at this moment but merely on the nature of the chart?

Mr. Caner: Yes, sir.

The Court: Such a document as is in the hands now of the Foreman is marked Exhibit No. 7 for Identification, it being, in type, the same as Exhibit No. 6, only more convenient for use by the jury; is that right?

Mr. Caner: That is right. The first letter that we see is BV followed by the number 145 followed by the—let's take those two columns.

The Court: What do they mean?

Q. Will you explain the meaning of those symbols?

A. The unit, after launching from the plane—

The Court: What does BV mean, in short?

The Witness: It is just the code letters.

The Court: It doesn't refer to underwear. What does it refer to?

The Witness: In correlation with the chart, that the pressure at that point is 145 millibars.

[fol. 47] The Court: How do you know that? Does BV mean, always, 145?

The Witness: In these specifications is listed a set of code groups that are used.

The Court: That isn't an answer to my question. Does BV always equal 145 millibars?

The Witness: No, sir.

The Court: Then how do you know that?

The Witnes: The unit has been calibrated by the manufacturer and this chart has been made up for this particular unit.

The Court: That is no answer. How do you know what BV means?

The Witness: I don't quite follow—

The Court: You said it means 145 millibars.

The Witness: Yes, your Honor, in this particular chart.

The Court: How do you know that?

The Witness: Because the chart says so.

The Court: Where?

Mr. Caner: It has been so calibrated, if the Court please.

The Court: You mean after BV it says 145?

The Witness: Yes.

The Court: What does BV mean?

[fol. 48] The Witness: Just the code group used.

The Court: That doesn't help. BV must mean something.

Q. With respect to the unit belonging to this particular chart will there come a time—may there come a time as the unit drops to earth when the signal BV is transmitted?

A. Yes, sir.

The Court: What does that mean, dah-dit-dit-dit?

The Witness: Dah-dit-dit-dit.

Q. What will that mean to the operator who is receiving the signal?

A. The operator will note that on his chart that he has and then would correlate that reading against a chart for the unit he is reading.

The Court: May I come back to my original question? BV is a reference to the signals of the primary Morse Code and means one dash and three dots and three dots and one dash transmitted from the instrument; is that correct?

The Witness: Yes, sir.

The Court: And similarly if the signal that the operator receives is DM or, rather, the Morse dash and two dots and two dashes; right?

The Witness: Yes, sir.

Q. What does the operator understand the pressure to be?

A. At that point he will note that the pressure on the chart is 185 millibars.

[fol. 49] Q. Now I show you the sample chart which was given to the jury and ask you that whether—in the case of the units to which this chart is applicable what does the signal DM mean with respect to that unit?

A. The signal DM denotes 180 millibars.

Q. Whereas with this unit, differently calibrated, it denotes 185 millibars?

A. Yes, sir.

Q. Moving to the next column, when the signal DM is received what is indicated by way of temperature?

A. The signal DM indicates 62—minus 62.4 degrees Centigrade.

The Court: Am I to understand that the same signal is used to transfer information both with respect to atmosphere pressure and with respect to temperature?

The Witness: Yes, sir. As I pointed out, there was a displacement in the three pickup arms and three signals were transmitted—

The Court: But the same Morse Code signal, for example, dash and two dots and two dashes, meaning the letters DM, conveys simultaneously information with respect to pressure and temperature?

The Witness: Yes, sir.

The Court: And it also conveys something else?

The Witness: Yes, sir.

The Court: And then another is humidity?

[fol. 50] The Witness: Yes, sir.

Q. To clarify that, there are how many sets of signals transmitted by the unit?

A. There are three sets of signals being transmitted.

Q. And the first, again, is pressure, did you say?

A. Yes, sir.

Q. So that when that signal transmits DM it means the pressure, in the case of the unit to which this chart is applicable, is 185; right?

A. Yes, sir.

Q. And the next signal is temperature; correct?

The Court: Not next signal, the same signal conveying another bit of information; is that right?

The Witness: Yes, sir.

The Court: It is one signal which has three significances; is that correct?

The Witness: No. They will alter according to the specific conditions existing at that time.

The Court: Wait a minute. I thought you told me, for example, DM conveyed, simultaneously, information both with respect to pressure and with respect to temperature. Did I misunderstand you?

The Witness: I thought we were—

The Court: Did I misunderstand you?

The Witness: I thought you explained it very nicely [fol. 51] and I thought I was following you there.

The Court: It is a question of whether it is correct, not whether I did it well or not. I want to be sure whether one signal, in the sense of the words or letters DM, gives to the receptionist, the person who hears it or the instrument that hears it, information with respect to two separate topics, at least two separate topics, pressure and temperature?

Mr. Caner: The single reading of the code group DM will not give him more than one topic.

The Court: Then I did misunderstand. Will you be good enough to tell me whether a signal is correlated to a particular type of information, either pressure or temperature or humidity?

The Witness: The signal in relationship to the position that it is transmitted is related to its own specific point such as pressure, temperature and humidity.

The Court: Then DM is a communication or signal with respect to what?

The Witness: It all depends on what part of the transmission you are receiving.

The Court: I don't understand that.

The Witness: The disk here is rotating.

The Court: It has three quadrants.

The Witness: Yes, sir.

The Court: Which are used, and a fourth which is idle. [fol. 52] The Witness: Yes, sir.

The Court: And one of the quadrants relates to temperature, one relates to humidity and one to temperature?

The Witness: Yes, sir.

The Court: Are the quadrants so divided that if I were to take a pie slicer and cut the circle into four parts one part would physically relate to temperature, one to pres-

sure and one to humidity, or would I have to make a cut like a cookie slicer?

The Witness: No, sir. If you split that in four quadrants you are absolutely right.

The Court: Like a pie?

The Witness: Yes, sir.

Q. So that the first signal is the pressure signal and when that returns DM you have a pressure of 185. Now, the—is that correct?

A. Yes, sir.

Q. Now, the second signal is the temperature signal, is it not?

A. Yes, sir.

Q. When that signal returns DM you have what by way of temperature?

A. You would have minus 62.4 degrees Centigrade.

Q. With respect to this unit would you get a signal DM for humidity?

A. No, sir.

[fol. 53] The Court: Why is that? Because that quadrant which relates to humidity doesn't respond to DM, or what, or doesn't send out the letters DM?

The Witness: That is a stable quadrant assigned to humidity which will not change in relationship to the unit itself. Once it is adjusted it stays and the readings are different but only within a certain range. They do not transverse past that range.

The Court: I don't understand you, I'm afraid.

The Witness: The chart will show you that—it is the fourth column and—it is the last column in on the first set of readings.

The Court: Is that RH?

The Witness: RH is the symbol used for humidity.

The Court: It has nothing to do with blood?

The Witness: No. It is relative humidity.

The Court: Relative humidity has a lot of blanks; correct?

The Witness: Yes, sir.

The Court: But it also has a lot of numbers below the blanks?

The Witness: Yes, sir.

The Court: Are those numbers indications that there are some letters, some signals which are given out with respect to humidity and sometimes there is no signal with [fol. 54] respect to humidity?

The Witness: Yes, sir.

The Court: I see DK, the third from the bottom, dash, two dots, dash, dot, dash?

The Witness: Yes, sir.

The Court: That does give a signal with respect to humidity, gives a meaning with respect to humidity?

The Witness: No meaning with respect to humidity.

The Court: I see; I beg your pardon. I was looking all the way over. If you look at NK, dash, dot, dash, dot, dash, fourth from the bottom, that does give a signal with respect to humidity; right?

The Witness: Yes, sir.

The Court: Now explain it.

Q. Now—

The Court: Wait a minute. I want him to explain it.

The Witness: The humidity is only measured between zero humidity and 100 per cent. There is no humidity over 100 per cent.

The Court: No. We are pretty close now.

The Witness: When you get the 100 per cent you are practically drowning, so that the humidity unit as manufactured will only respond up to 100 per cent. You just can't get any higher.

The Court: You can't get down to zero, can you, really, [fol. 55] except under laboratory conditions?

The Witness: Yes, sir.

The Court: You can?

The Witness: Well, it would be pretty close but it would have to be under laboratory conditions.

The Court: Or you would have to get so high in the atmosphere as to be beyond the range of this radiosonde; right?

The Witness: Yes, sir.

Q. This chart does not take it down below 15 per cent relative humidity, does it?

A. Yes, sir. Fifteen per cent, that is all it goes to.

Mr. Caner: We have heard that the signals with respect to pressure and temperature will denote different things depending on which instrument it is.

The Court: Which what? Which arm, you mean, perhaps. Not which instrument.

Q. Well, depending on the instrument and its calibration, am I not correct in saying that the signals returned for pressure and temperature will denote different things?

The Court: I don't understand that question. The witness is having some trouble, too. Start again, please.

Mr. Caner: I will break it down.

Q. With respect to temperature, the signal DM on this chart means something different than the signal DM on this other chart?

[fol. 56] A. Yes.

The Court: You now are pointing to Exhibit No. 6 and Exhibit No. 7 for Identification and the reason it means something different is that it relates to two different radiosondes, each radiosonde having its own schedule; is that right?

The Witness: Yes, sir.

Q. Is there any difference with respect to humidity?

A. No, sir. Humidity is the same for each unit.

Q. So that there is a difference as between the temperature and humidity but the units are calibrated the same for humidity?

A. Yes, sir.

Q. So that—

The Court: You didn't mean that "adjusted" is the definition for "calibrated" did you?

The Witness: Well, the terminology—

The Court: Will you get me the Oxford English Dictionary, please, Volume C. "Calibrated" means something different, doesn't it? Hasn't it to do with a relationship established between one scale and another so that they are in some way brought into relationship, one being a key to the other?

The Witness: Yes, sir.

The Court: That is nearer right than "adjusted," isn't it?

The Witness: In this particular—

[fol. 57] The Court: It isn't a question of adjustment, it is a question of using one scale as the interpretive measure of another scale or another set of facts.

The Witness: In this particular instrument we use the word "calibration" and "adjustment"—was just married together.

The Court: You may have married them but I am going to drive them asunder.

The Witness: In the process of calibration you have to make these adjustments.

Q. Will you explain to us—perhaps this will help—how a unit is calibrated?

A. In the calibration for the pressure your initial first point to be calibrated will be 990 millibar level. That is the same on all units. All units are adjusted at the 990 millibar level and to give you the code group WB.

Q. So that do I understand that all units are all calibrated to read WB at the 990 level?

A. Yes, sir.

The Court: May I call your attention to a definition of the word "calibrate" as it appears in Volume II of the Oxford English Dictionary, page 32, which begins with the suggestion that it means to determine the calibre of, more specifically, to try the bore of a thermometer tube or similar instrument so as to allow, in graduating it, for [fol. 58] any irregularities. To graduate a gauge of any kind with allowance for its irregularities, and its usage, for example, by Tyndall in his treatise on Heat, "I give here the method of calibrating the galvanometer." So would it be fair to say that to calibrate something, as used in connection with Exhibit No. 1, being the radiosonde here, and Exhibit No. 6 and Exhibit No. 7 for Identification being the charts means to graduate the gauge, to wit, the radiosonde gauges with allowance for irregularities in such a way as to make it reportable on the chart?

The Witness: Yes, sir.

Q. You have told us that the units would be calibrated at 990 millibars to return the signal WB and the signal WB does show 990 millibars on this chart No. 7?

The Court: That, as a matter of fact, is 6, but 7 for Identification is the same, being what a juror has.

Q. On this chart, No. 7 for Identification, will you come over here and tell us what the symbol WB is calibrated to return?

A 990.

Q. So that when the—

The Court: That being dot, dash, dash, and dash and three dots. I think you better stay within the Morse Code. That may turn out to be very significant in connection with this alleged falsehood in the testing.

Mr. Caner: I confess that I do not know Morse Code, your Honor.

[fol. 59] The Court: Get a book which shows it. It is probably in the World Almanac.

Q. Now will you tell us what the next step is in calibrating for pressure?

The Court: It is in the Encyclopedia Britannica. (To the Court Officer) Get Miss Sheppard to get the volume of Encyclopedia Britannica which has the Morse Code in it.

Q. Will you tell us what the next step is in calibrating for pressure?

A. After you have adjusted to the 990 millibar level to get the code letters WB, then you put that instrument through a chamber and reduce the pressure in the chamber to simulate atmospheric conditions at specified heights to a level less than 150 millibars.

The Court: Please; I don't understand that and maybe some of the jurors have a little difficulty. Break down that answer, please.

The Witness: In reducing the pressure in a chamber—

The Court: What chamber are you talking about?

Mr. Caner: Perhaps you could use this chart. May I bring it closer to the jury?

The Court: Certainly. Anything that will help. Haven't you got some copies, too?

Mr. Caner: The jurors have it.

Q. I will stand over here and point out the positions [fol. 60] where the operations take place. You are referring to a pressure chamber. Which chamber do you mean?

A. Position No. 5.

Q. Perhaps you might describe what this pressure chamber is.

The Court: First of all point out where it is on the chart, would you, please, again? For the benefit of an appeal court, it is the second row down, one-third of the way across; is that right?

Mr. Caner: Position No. 5 as shown on the chart.

Q. Will you tell us what that chamber is?

A. That chamber is a cylindrical metal chamber which has a cover that can be sealed into the chamber.

The Court: Have you got one in your hand there somewheres?

The Witness: The thing is rather bulky and heavy.

Q. What is its size?

A. The size of the particular thing I couldn't give, but approximately I would say three feet—

The Court: Like an ash barrel?

The Witness: Yes, sir. Inside of this chamber you have the mounting rack or the rack where so many units are placed upon it to be inserted into the chamber. These racks have terminals so that you will put in, insert the electrical wiring of the radiosonde unit into these terminals and these terminals are in turn wired to an assem- [fol. 61] bly and also to a recording device.

The Court: I'm sorry, you make it sound like an electrical medicine cabinet in which you take a steam bath. I don't understand exactly how it operates. It is shaped, you say, like an ash barrel; right?

The Witness: Yes, sir.

The Court: What has it inside? Bulbs?

The Witness: No, sir, it just has a metal rack where you place your eight units—

The Court: Don't use the words "units" and "racks." That doesn't help much. We think of different things. Can you look at it from the top or side, or how do you look at it?

The Witness: Through the front.

The Court: The front of a circular object is where?

The Witness: The front is a circular object.

The Court: Is it shaped like an ash barrel?

The Witness: Yes, sir.

The Court: An ash barrel doesn't have a front.

The Witness: The chamber is laid flat on its side.

The Court: All right. (To Mr. Caner) There is the International Code for you, if you need it.

The Witness: These units are placed in work boxes, boxes similar to this, and then they are placed on these racks and are plugged in by these terminals here.

The Court: A terminal, in ordinary usage, is the kind [fol. 62] of socket you put into an electric light—I mean it is the kind of plug you put into an electric light socket; is that what a terminal is?

The Witness: Yes.

The Court: "Terminal" can mean anything in the world from the South Station down. We have to have this so described that we understand exactly what you are talking about, and some of us are very thick.

Q. Do you mean a plug?

Mr. Angoff: Why look at me?

The Court: It took you all summer. It may take us all fall if we are not careful.

A. A terminal is a form of a plug. The end section which is composed of metal with three prongs is called a terminal.

The Court: It is a three-pronged plug?

The Witness: Yes, sir.

The Court: Go ahead. Inside this barrel what are there in addition to what you have told us?

The Witness: Inside the barrel there is nothing else. There is connected to external controls, and these—

The Court: Well, that doesn't help us. What are external controls? I might be a control, and I am external.

The Witness: The external controls associated with this equipment will vary the amount of air in the chamber.

The Court: Is it a kind of dial as on a radio?

[fol. 63] The Witness: No. It is quite lengthy to explain, sir.

The Court: Well, all right. We have got to understand it. This is a criminal case in which every detail is of great consequence because the charge is falsehood, and more than that, in connection with the reporting of readings.

The Witness: This control operates and controls a pump which extracts or inserts air into the chamber to vary the pressure of that chamber.

The Court: Let's start again much more simply. What kind of control is it? Does it look like a radio knob?

The Witness: No, it is a massive piece of equipment. It has various electronic controls, mechanical controls.

The Court: Those are words which convey no picture to me. They are just dictionary words. Will you be good enough to describe it again for this 14 year old boy who I am imagining knows a little, but not much.

The Witness: The controls are operated by push buttons which are in the front of the work table and on which this pressure table is resting on.

The Court: It looks like a barrel on the table?

The Witness: Yes.

The Court: On the table are buttons, or what?

The Witness: Yes, sir.

The Court: Just buttons?

[fol. 64] The Witness: Buttons and a recording device similar to here.

The Court: Similar to Exhibit 1-A?

The Witness: Only it records eight instruments at once.

The Court: Don't get us too far into the picture. We have something which looks like an ash barrel standing on the table and on the table there are buttons?

The Witness: Yes, sir.

The Court: And you have a gauge?

The Witness: Yes.

The Court: Something like on an automobile?

The Witness: No, sir, it is a vertical gauge, standing up.

The Court: Does it look like a standing thermometer?

The Witness: It looks like a standing thermometer, yes, sir.

The Court: How does it appear? Remember we don't know anything. We have never seen this.

The Witness: It is rather difficult for me, sir. It is three years since I last saw the instrument.

The Court: Well, you have got an advantage. You have seen it; we haven't.

The Witness: We have this gauge which is connected to the chamber.

[fol. 65] The Court: Now, now, now. You have this standing thing which is connected to what? What is a chamber? It could be my office, which is called a chamber. It could be a pot, which is called a chamber.

The Witness: This barrel, as pointed out, also connected to this barrel through our instruments which are controlled by the buttons from the front. These instruments will respond electrically—

The Court: This barrel, as pointed out, also connected to this barrel through our instruments which are controlled by the buttons from the front. These instruments will respond electrically—

The Court: Have you a little child, by any chance?

The Witness: Yes, sir.

The Court: Just imagine—how old is that child?

The Witness: Twelve, sir.

The Court: Just imagine you were trying to tell that child about this and see whether you can use language which would be appropriate to communicate with that child. We are all minors and infants with respect to this field of knowledge and we need that kind of simplicity which you customarily use, I assume, when you talk with your 12 year old child. You don't use "chamber" and "electronics" and things like that.

The Witness: Sir, it is going to be rather difficult.

The Court: I know, but you have to translate it into our limited intelligence.

The Witness: I will try my best, sir.

The Court: Do you want a little recess to think about it and go over it with Mr. Caner for a few minutes? There [fol. 66] is no objection to trying to think this through simply.

Mr. Caner: All right, your Honor. I don't think we have to go into it in extreme detail.

The Court: I am not at all sure about that. Of course I don't know any more than what the indictment says. If I understand, we are ultimately going to come to very nice questions with respect to the operation of these instruments.

Mr. Caner: We are going to come to questions involving testing. At the moment we are on production, which is somewhat preliminary.

The Court: Isn't it going to be testing in connection with records and recordings on these devices?

Mr. Caner: Oh, yes.

The Court: Then we have to understand the device.

Mr. Caner: I would like a recess also for the demonstration of the unit.

The Court: How long?

Mr. Caner: Fifteen minutes.

(Brief recess.)

Mr. Caner: If the Court please, I wonder if I could attempt to go through the production operation rather generally, coming back to it after the testing procedures have been described, if the Court feels it should be explained to the jury in more detail.

The Court: I am certain it ought to be explained in [fol. 67] detail. I am not trying to tell you of the order of proof.

Q. As I understand it the pressure box or chamber in Position No. 5 is a box, the pressure of which can be raised or lowered by a pump; is that correct?

A. Yes, sir.

Q. In the process of calibration what pressure do you put the box at first?

The Court: Excuse me, how is this box shaped? What does it look like?

The Witness: It is the barrel.

Mr. Caner: The barrel; excuse me.

The Court: Just imagine, please, we are only 12 and we don't want to be confused by having barrels called boxes and boxes called barrels.

Q. After the units are put in the barrel what pressure level is the barrel brought to?

A. About 150 millibars.

The Court: You don't bring the barrel to a pressure. There must be something you bring. What is it, the atmosphere?

Mr. Caner: The atmosphere in the barrel.

The Court: You have got to get this absolutely and precisely correct because I am sure, from reading the indictment and knowing nothing else, we have got to understand a lot about how this works technically, as though it were a patent case. There is atmosphere in the barrel. Is it a quasi-vacuum or not?

[fol. 68] The Witness: That's right, a quasi-vacuum.

The Court: How do you alter the pressure inside the barrel?

The Witness: By evacuating the air in the barrel through a pump.

The Court: How does the pump work? By electricity?

The Witness: Yes.

The Court: What does it do, suck out something?

The Witness: It sucks out or pumps in air.

The Court: What causes it to operate?

The Witness: The operator pushing the button.

The Court: On the table?

The Witness: On the table, sir.

The Court: Then does it suck out all that it is possible to suck out or how does it operate?

The Witness: The operator controls the amount of air that it will suck out of the barrel and he is able to stop that—

The Court: He isn't able to do it by just pushing a button, is he?

The Witness: Yes, he pushes a button.

The Court: He pushes down further when he wants more sucked out?

The Witness: He watches a gauge.

The Court: He doesn't just push a button from time to time and watch the gauge, does he? That is not the way it [fol. 69] operates?

The Witness: He is looking for a certain level.

The Court: I don't know what he is looking for but I am trying to find out what he does.

The Witness: He looks for a certain level and he presses the button.

The Court: Does he keep the finger on the button until the level is reached?

The Witness: Yes, sir.

The Court: So that the length of time he holds a finger on the button determines the length of time the pump operates?

The Witness: Yes, sir.

The Court: Just as simple as that?

The Witness: Yes, sir.

The Court: And he watches the gauge?

The Witness: Yes, sir.

The Court: And as the gauge reaches the point he wants he lifts his finger from the button?

The Witness: Yes, sir.

The Court: And that is the reduction of the amount of pressure or what not in the barrel?

The Witness: Yes, sir.

The Court: Have you described the whole of the process as it works to a 12 year old child who doesn't know about [fol. 70] physics?

The Witness: I don't follow you.

The Court: Is there anything else you would have to tell a 12 year old child in order for him to know what is going on? He doesn't know any physics.

The Witness: Well, at the time that the operator, by using these buttons and watching the gauge, has brought

the pressure in the barrel down to the level that he wants to check—

The Court: When the gauge reads the way he wants it to read?

The Witness: Yes.

The Court: Then he takes his finger off?

The Witness: Then he takes his finger off and he has another button which he presses. This button causes a motor to turn and also causes some markers which are—

The Court: Causes some markers? I don't understand that.

The Witness: These markers will mark on the paper.

The Court: You mean he pushes a button which causes a pencil to write?

The Witness: Not exactly a pencil, sir. They are a piece of metal that will go on a piece of typewriter ribbon which a piece of paper—

The Court: It looks like one of these temperature charts you see on the Boston Common and elsewhere [fol. 71] which records changes in temperature and humidity? You walk along the street and you see in a window, either on the Common or the Atlas Bank or whatever; it is called some such. There is a gauge moving back and forth?

The Witness: I am not familiar with that; I haven't seen that.

The Court: Have you seen the temperature or humidity charts in a window which have some kind of recording device which moves back and forth and creates, on a piece of paper, something that looks like the movement of a stock market over a week or month or year; do you know what I mean?

The Witness: I follow you.

The Court: Is that what this is?

The Witness: This is slightly different. The recorder that is marking the tape is similar to the one exhibit standing on the edge of the desk there.

The Court: I don't see that and the appellate court can't see it at all. 1-A? You mean this roll of white paper?

The Witness: The roll of white paper and the—this whole instrument is known as a recorder.

The Court: The whole instrument is not photographed in the appellate record. You have to describe it in words so that somebody who picks up the transcript and reads what you say knows what you are talking about.

The Witness: The instrument has a motor which will [fol. 72] move the tape along. It also has a relay, a point which marks, which is moved in relationship to the signal coming out of the radiosonde.

The Court: You mean it looks like if you lift the hood of an automobile and you saw the relationship between the flywheel and something else; is this the way it looks?

The Witness: I don't quite follow that, sir.

The Court: Tell it so that this little child can understand what you are talking about.

The Witness: As the tape is moving along, being driven by this motor—

The Court: You must have an awfully smart 12 year old child.

The Witness: I have to answer her questions. As the white tape is moving along here there is a marker here which is moving up and down and giving a mark on the tape to denote dots and dashes.

The Court: In other words it is irregular in its impact. Somtimes it has a short span and sometimes a long span of contact. When it has the short span it makes a dot; when it has the long span it makes a dash; is that right?

The Witness: Yes, sir.

The Court: So that somebody who looks at the tape finds on it dots and dashes which look like you used to see in an old telegraph office in the days in which dots and [fol. 73] dashes instead of letters were transmitted; is that right?

The Witness: Yes, sir.

Mr. Angoff: Your Honor please, do you mind if my defendants move so that they can see?

The Court: They can move, surely. All right. We understand this thing jigs back and forth making dots and dashes on the tape. Is that what happens?

The Witness: Yes. These dots and dashes are from the unit being tested or the radiosonde being tested.

The Court: The operator pushes a second button which causes these dots and dashes to be marked on the tape; right?

The Witness: Yes, sir.

The Court: And the dots and dashes are Morse Code signals?

The Witness: Yes, sir.

The Court: And they correspond with the traditional Morse Code which we have already talked about?

The Witness: Yes, sir.

The Court: So that if you get AB, dot, dash and dash and three dots, somebody who looks at the tape knows what, inside this barrel, the amount of pressure is?

The Witness: Yes, sir.

The Court: Have I got it now correctly?

The Witness: Yes, sir.

Q. To what pressure point is the barrel first brought in [fol. 74] the process of calibrating it?

A. To 150 millibars.

Q. And at that point the operator starts the motor which produces the tape with the signals upon it; is that right?

A. Yes.

The Court: How does he know it is at 150?

The Witness: He is watching the gauge he has in front of him.

The Court: He sees that come up to 150 and then he starts pressing the second button?

The Witness: Yes, sir.

Q. Producing a signal recorded on the tape?

A. Yes, sir.

Q. What does he do with that signal?

A. That signal is then used in establishing the—

The Court: Come. Your little boy or girl 12 years old doesn't use the passive and you better not. That is a very sophisticated form of speech which manages to conceal what goes on. You want to use the active when you want to tell what happens.

The Witness: The operator then uses this signal which he has on the tape to make up a chart for the pressure, showing the pressure of this particular unit at that point.

Q. What is the level which he next brings the barrel to?

A. 350 millibars.

[fol. 75] Q. And records the signal at that point; is that right?

A. Yes, sir.

Q. And the next level?

A. 550 millibars.

Q. And records the signal at that point?

A. Yes, sir.

Q. And any other levels?

A. 750 millibars.

The Court: Excuse me. I am a little lost. He brings it up to 350 and 500 and he does this by pressing the button?

The Witness: Yes, sir.

The Court: And the pump operates by the button?

The Witness: Yes, sir.

The Court: And the pump continues to operate until the gauge gets to a point where it reads 350 or 500?

The Witness: Yes, sir.

The Court: And then he presses the second button and gets the signal?

The Witness: Yes, sir.

The Court: The signals being dots and dashes on the white tape?

The Witness: Yes, sir.

Q. So that at what levels in all has he calibrated the device?

A. 150 millibars, 350 millibars, 550 millibar level, 750 millibar level, 950 millibar level and then 990 millibar level.

[fol. 76] Q. Do those levels give him the information which he needs to make up a chart such as this?

A. It will give him the information to make up a chart for the pressure.

Q. Including all the intermediate positions between the positions which the unit has been calibrated at?

A. Yes, sir.

The Court: Mr. Caner has in his hand Exhibit No. 6, and you are referring not to all aspects of Exhibit No. 6 but you are referring, are you not, to the letters which stand for Morse Code telegraphic symbols as the letters BN and you are referring to a particular column which relates to pressure; is that right?

The Witness: Yes, sir.

The Court: And that's all you are referring to on that particular exhibit?

The Witness: Yes, sir.

The Court: All right.

Q. Now, with respect to temperature calibration will you tell us in simple terms what equipment was used to calibrate the radiosondes for temperature?

A. The first position was to set at the 30 degrees Centigrade mark—

The Court: How is your 12 year old child doing at this stage? The Judge is lost. I don't know whether your 12 [fol. 77] year old child knows what you are talking about.

Q. The question is what equipment was used in calibrating the units for temperature and where is the equipment described on the exhibit.

The Court: What is the equipment, simply.

The Witness: The equipment on Position No. 2, which is the first point, consisted of a motor and electric heaters and a little fan to control the flow and some—a shutter arrangement to control the flow of air at that particular opening.

The Court: Will you be good enough to tell me where upon this exhibit, the one with the "Ladies' Room" that will be found?

Mr. Caner: It is Position No. 2, if the Court please.

The Witness: I mentioned Position No. 2.

The Court: Right next to the "Ladies' Room"; isn't that right?

The Witness: Yes, sir.

The Court: We will be able to find these things much quicker by graphic description than we will by numbers and things of this sort which we always have difficulty with.

Q. Is a barrel, box or chamber involved in the temperature calibration?

A. In this position, no. It is just a hole in the table where the air is being forced through by a fan.

The Court: A hole in the table?

[fol. 78] The Witness: Yes, sir.

The Court: Is this the same table which the operator was sitting at at the time he was pushing buttons to decide pressure?

The Witness: No. That is Position No. 2.

The Court: It is a different operator entirely and a different table?

The Witness: Yes, sir.

The Court: And it is a table with a hole in it?

The Witness: Yes, sir.

Q. And it is a different operator, is it not, or different worker?

A. Yes, sir.

Q. And what does that worker do with the radiosonde at that position?

A. He puts the radiosonde over this hole and by setting this shutter on the fan—

The Court: Wait a minute. Where is the fan?

The Witness: There is a motor and a fan underneath the table.

The Court: Underneath the hole?

The Witness: Yes, sir.

The Court: He starts the fan going; is that right?

The Witness: Yes, sir.

The Court: And that blows air through the hole into [fol. 79] the radiosonde?

The Witness: Yes, sir.

The Court: All right. The child understands. Go ahead.

Mr. Angoff: Your Honor please, when we calibrated that child this morning he was 14.

The Court: Now he is reduced to 12. The child is calibrated by 12 if the father is a professional and 14 if not a professional.

Q. Having started the fan what does this worker then do?

A. Then he has thermometers on this instrument which he can observe and he will set the opening of the fan so that he will get on the thermometers a reading of 30 degrees.

Q. And then what does he do?

A. Then he will take the radiosonde unit which is placed on the hole and make an adjustment of the pressure adjustment screw.

The Court: Which is underneath—

The Witness: Which is underneath the radiosonde unit.

Q. Pressure or temperature?

A. Temperature.

The Court: When you say you make an adjustment, is it a twist or turn?

The Witness: He will twist in or he will twist the screw out.

[fol. 80] The Court: He will twist the screw out? You mean he will release the pressure by unloosening the screw, but he doesn't take the screw out, does he?

The Witness: No. He will turn it in—

The Court: He either turns it to the right or left. If he turns to the right it has one effect, or if he turns to the left it brings more of the screw head out and therefore reduces or lowers the temperature?

The Witness: No. He is adjusting the unit and he is setting the position of the pickup arm in relation to its position on the record.

The Court: Am I to understand that the screw operates to raise or lower the arm?

The Witness: Yes, sir.

Q. And to change the signal, does it not?
A. Yes.

The Court: How does it change the signal? That I don't quite understand.

The Witness: The screw is into the bimetal temperature element and in the suspension—

The Court: Bimetal temperature element. What in heaven's name is that?

The Witness: It is the unit or the element that responds to the changes in temperature.

Q. Will you point it out on the device?

[fol. 81] The Court: It is the needle on the arm?

The Witness: No, sir. It is this two pieces of metal here.

Mr. Caner: Take it up to the Judge.

The Court: Don't take it up to me. He has got to say it so that an appellate court, which is blind and can only listen, will understand.

The Witness: The adjustment screw will vary the distance of this bracket or this metal arm here on which the pickup arm is attached to the link. When this is adjusted it will—

The Court: "This." Do you suppose the appellate court knows what you mean by "this"?

The Witness: When this screw is adjusted the arm holding the elements will move up or down in relationship to the pickup arm which corresponds in a change up or down across the disk or the record and as it moves up or down across the record it will give you various code groups, code letters in relationship to the point on the disk where it is at.

The Court: If I understand this correctly it means if the arm is over a certain point in the record the signal it gives depends on the way it rests upon that point. If it is resting with some degree of pressure it gives one signal; if it rests with more pressure it gives another signal; is that right?

The Witness: No, sir.

The Court: Then I don't understand it. I, in my mind's [fol. 82] eye, see a record player as you asked me to see it. Wait a minute. I don't know what you are doing. Please sit down at the moment, Mr. Mitchell. As I understand it, you told us this is like a record player and the arm is over the record and, if I understand you correctly, the operations that you make with this screw on the thing, or the operator does, has an effect upon the arm which is over the record?

The Witness: Yes, sir.

The Court: If I understood you correctly, different signals may be emitted, sent out from the record when the arm is positioned over a particular point in the record, depending upon certain factors; is that correct?

The Witness: Yes, sir.

The Court: What are the factors which determine whether at a particular point of the record a signal will be given in one form or in another form? Is it the degree of pressure with which the arm rests upon the record, or what is it?

The Witness: It is the code groove that it is in at that particular point.

The Court: In other words it doesn't really rest on the same point when it gives different signals, it rests on one point or another, it is in one groove or another. They may be very close together but the grooves are separate?

The Witness: Yes, sir.

[fol. 83] The Court: So you are not correct when you said it was on one point of the record from which the different signals will come. It may rest on a point so closely adjacent to the first position as to give a different signal, depending upon whether that point is in a different groove; is that right?

The Witness: Yes, sir.

The Court: Are the grooves of varying depths?

The Witness: No, they are standard.

The Court: There are concentric circles on the record or grooves like spirals?

The Witness: Yes, only for a portion of about 90 degrees which is a quarter of a circle.

The Court: What determines whether the needle, or whatever you would like to call it, the arm, enters one groove or another?

The Witness: That is determined by the displacement of that arm.

The Court: How is a 12 year old child doing on that word "displacement"?

The Witness: It depends on the position that that arm is at that particular time.

The Court: What determines the position of the arm?

The Witness: That is determined by the atmospheric—

The Court: This 12 year old child, he is getting a little confused.

[fol. 84] The Witness: The position of the arm is governed by the air, the pressure of the air existing at that time for the first pickup arm. The position of the second pickup arm is in relationship to the temperature, whether the air is warm or cold—

The Court: Is this the temperature inside this radiosonde or is it somewheres else?

The Witness: It is supposed to be the air temperature.

The Court: Inside of the radiosonde?

The Witness: No. The air temperature itself.

The Court: Certainly not inside of your collar. Where is it?

The Witness: In the room.

The Court: So this responds to the temperature in the room or in the area surrounding the radiosonde?

The Witness: That's right.

The Court: How large an area? Half a mile or 100 yards?

The Witness: I don't know where they drop them. I don't know how much area it does encompass as far as the changes in temperature are related to the unit itself.

The Court: But that air is the governing consideration with respect to where the arm rests upon the record?

The Witness: The temperature of the air.

The Court: And the temperature of the air by itself [fol. 85] causes the arm, which is made of human hair?

The Witness: That is the humidity element.

The Court: What is the arm made out of?

The Witness: It is made out of metal and has a needle, also, to follow the grooves in the disk.

The Court: What is the needle made out of? It looks roughly like the diamond needle on a long playing record player.

The Witness: Yes, sir.

The Court: And this needle is raised and lowered on to the record by the temperature of the room?

The Witness: No. The needle—the pickup arm—the record goes around and at the time it goes through the position that pickup arm is at, then the pickup arm will transmit the particular code group—

The Court: Let's not get into transmission yet. What makes that needle on the arm rest in a groove or get out of the groove?

The Witness: As the record comes around the disk itself has a groove which is like a V.

The Court: If you examine an ordinary phonograph record carefully under a microscope it would look the same?

The Witness: Yes.

The Court: It has this trough-shaped groove like a V?

The Witness: Yes.

[fol. 86] The Court: What makes the needle rest in the troughs or rise from the troughs?

The Witness: As the record comes around, the needle being in a position in relationship to the air temperature—

The Court: A simple explanation for this 12-year old, what makes the needle go into the troughs and come out?

The Witness: The record itself is raised at that particular portion where the code group is. The position of the needle itself does not move up and down.

The Court: Then it doesn't come from the trough?

The Witness: No, sir. I pointed out only 90 per cent of that code disk contains the code. The rest is blank.

The Court: We are not talking about transmission. We are talking about the position of the needle in the trough. It doesn't make any difference whether the quadrant of the record is one which transmits signals or not, it still has a channel or trough in which the needle rests, hasn't it?

The Witness: No. 90 degrees of that record it only has the trough.

The Court: And three-quarters of the record—

The Witness: Three-quarters of the record resets so that the needle is clear of the record at that time.

The Court: As the record goes around, the needle rests on the record one-quarter of the circle and then the needle rises and isn't in contact with the record?

[fol. 87] The Witness: That's right, sir.

The Court: Remember that the Court of Appeals won't see it at all. The Court of Appeals will have to get this whole thing another way. Go ahead, now. What makes the needle rise from the trough at the point where the record has gone one-quarter of the way around and it is now time for it to rise from the record so that the record and the needle will not be in contact during those three-quarters of the record where there is no signal to be transmitted?

The Witness: When the section with the grooves passes the needle, then the record is made so that it goes down. It is bent. In the manufacture it is bent so that the three-quarters section is lower than the section that had the groove in it.

The Court: In other words it doesn't look like a long-playing phonograph record but it has two levels, one level being higher on which grooves are which emit signals and three-quarters being lower and not emitting signals?

The Witness: Right, sir.

The Court: When the needle has finished on the one-quarter which emits signals, what happens next? The needle rises, does it?

The Witness: No.

The Court: The record just goes along and the needle is free because there is no point of contact, the three-[fol. 88] quarters of the record being lower in level than the one-quarter which transmitted signals?

The Witness: Yes, sir.

The Court: It is now a stage a little later, the record has gone three-quarters and we are back again at the point where it is ready to transmit information; right?

The Witness: Yes, sir.

The Court: What brings the needle to a particular

trough or channel on that quarter of the record which is going to give a signal?

The Witness: That is the relationship to the temperature existing at around the radius at that particular time.

The Court: You mean if the temperature is 80 degrees the needle would go in one trough and if it is 90 it will go in another trough?

The Witness: Yes, sir.

The Court: And the temperature will determine what position the needle takes on the recording part of the record?

The Witness: Yes, sir.

The Court: And once it is on the recording part it will emit signals in dot and dash form which convey, under the Morse Code, letters such as AB, dot, dash, and dash and three dots, which in turn stand for certain symbols of temperature which are recorded on the calibration chart which is Exhibit 6; is that right?

[fol. 89] The Witness: Yes, sir.

Q. Now, I believe we were at Position 2 and you were telling us that through the hole in the table was transmitted a temperature of plus 30 degrees Centigrade; correct?

A. Yes, sir.

Q. And what was the worker doing at that point?

A. At that point then he would adjust the screw on the temperature element of the radiosonde to give the code groove SX.

The Court: What does that mean?

The Witness: The dots and dashes which, interpreted, are the Morse Code for the letters S and X.

The Court: Three dots, a dot, two dashes and a dot, being the letters S and X?

Mr. Caner: X is a dash, two dots and a dash.

The Court: That is the old English system, not the modern American one. I should have given you the Encyclopedia Americana.

The Witness: Dot, dash, dash, dot, dit-dah-dah-dit, is a P.

The Court: Under which system? S is three dots.

The Witness: Yes, sir.

Q. Do I understand every unit is calibrated to send the symbols for SX at plus 30 degrees Centigrade?

A. Yes, sir.

[fol. 90] Q. So that any accurate radiosonde, when it is transmitting the signals for SX, is showing plus 30 degrees Centigrade?

A. Yes, sir.

Q. All right. Now, what is the next operation in the calibration for temperature?

A. The next operation takes place at Position 3 which is at the upper left-hand corner of the chart and it is named on the chart "Temperature Chamber."

Q. Will you describe this temperature chamber?

A. Temperature chamber is just a box.

The Court: This is a square box?

The Witness: I will try to give you the measurements. About 4 by 5 feet and about 3 feet deep. It has a cover on it which you can lift and it has little metal racks which you place your radiosonde units inside of.

The Court: Excuse me, I thought you couldn't lift the box.

The Witness: The racks are in the box. There's racks, metal racks which you place your radiosonde units on to test.

The Court: You can lift the cover of the box sufficiently to put them in?

The Witness: Yes. The cover comes up on a suspension.

The Court: And you rest one radiosonde at a time on a rack?

[fol. 91] The Witness: No. The capacity of the box is for six units that you can place on this rack.

The Court: So there are six units that look like Exhibit 1 which are simultaneously put in this box?

The Witness: No. They look like Exhibit 1 with the exception of the parachute.

The Court: All right. Leaving aside the parachute there are six units, each of which resembles Exhibit 1 and which is put in the box?

The Witness: Yes, sir.

The Court: What is the object of this box?

The Witness: This box is used to check the response of the unit at the minus 50 degrees Centigrade level.

The Court: This 12-year old child has been lost. You have to come back again and tell me what it is it does.

The Witness: The chamber being at minus 50 degrees Centigrade.

The Court: How is it at minus 50 degrees Centigrade? You mean it is a kind of icebox?

The Witness: Yes, sir.

The Court: And operates like the familiar Frigidaire by operating with some kind of a dial?

The Witness: Yes, sir. The operator is able to control that temperature at minus 50 degrees Centigrade.

The Court: After these instruments are put in, what [fol. 92] happens next?

The Witness: After the instruments are put in, the temperatures start—brought down to 50 degrees Centigrade. Then the operator pushes a button which operates a motor and a piece of paper—roll of paper—and it operates—contacts like telegraph keys which will mark spurious marks.

The Court: What kind of marks?

The Witness: Spurious marks.

Mr. St. Clair: I object to that term. I didn't hear it right the first time.

The Court: If you use "spurious" in the sense I understand the word I will have to ask you what you mean. What do you mean by "spurious marks"?

The Witness: Marks that are being marked on the tape by signal.

The Court: That doesn't make it spurious. If I understand, spurious means false and giving an impression which is not the right impression.

The Witness: I am not using it in that sense.

The Court: This being a case which involves fraud, the use of the word "spurious" is bound to have an effect as to which defendants' counsel are certain to object. Will you please tell me what you meant by the word "spurious" and why not just marks?

The Witness: Marks.

[fol. 93] The Court: What did the word's use do except adding color and objection?

The Witness: I just used it—

The Court: What does it mean to you?

The Witness: That means signals being received through the atmosphere or through wire channels and so forth and so on.

The Court: You mean if I saw a teletype machine reporting stock market prices those would be spurious?

The Witness: In the terminology I used, yes, sir.

The Court: I think Wall Street would be horrified to be told you regarded those as spurious.

Mr. St. Clair: As is the defendant.

The Court: "Spurious" doesn't mean anything, does it?

The Witness: Yes, it is actually—spurious is the spur of the moment—

The Court: Oh. Instantaneous, you mean?

The Witness: Instantaneous signals.

The Court: Now I understand.

Q. So we have the chamber at minus 50 degrees Centigrade. Are the signals sent off by the unit at that point and recorded somewheres?

A. Yes.

Q. Where are they recorded?

[fol. 94] A. They are recorded on the paper which is being fed through this marking device.

Q. Is any particular signal supposed to be transmitted by the radiosonde at minus 50 degrees Centigrade?

A. It is supposed to transmit the signal denoting the code group that it is in at minus 50 degrees Centigrade.

The Court: What is that? For instance, might it be TE?

The Witness: The signals will vary, sir, according to the various instruments.

The Court: How does a 12-year old child like that answer?

The Witness: Each instrument does not have the arm at the same point of the disk at minus 50 degrees Centigrade.

The Court: But there will be a set of dots and dashes

appropriate to each instrument for 50 degrees; is that right?

The Witness: Yes, sir.

The Court: And it might be the letters TE?

The Witness: Yes, sir.

The Court: And then it would be a dash and a dot; right? Is that right?

The Witness: Well, we don't use those letters in the code.

The Court: What ones do you like? CH?

[fol. 95] The Witness: AB.

The Court: I never heard of this until yesterday. How can I know anything about it?

The Witness: We had the letters A, B, D, G, K, L, M.

Q. On this chart, Exhibit 6, what signals were to be sent at minus 50 degrees Centigrade?

A. At minus 50 degrees Centigrade that unit would send out a signal GN.

The Court: Dash, dash, dot; dash, dot: right?

Q. And that is also the designation of the chart, is it not, up in the upper right-hand corner?

A. Yes, sir.

The Court: That 58 GN, somebody who knows what the symbol means refers to a particular radiosonde; is that right?

The Witness: No, sir.

The Court: What does it mean?

The Witness: The GN on that particular chart, that is used exclusively by the contractor or the production personnel. They use that symbol GN to denote to them that is a GN chart for temperature, only.

The Court: The GN 58 refers to the type chart and has no relation to the given instrument?

The Witness: It is a type chart that shows the minus 50 for the letters GN.

[fol. 96] The Court: Exactly like Form 564, Internal Revenue Service, to wit, nothing to do with the entrant who uses the form but for the particular—

The Witness: I got lost.

The Court: It is a standard form for the reporting of information but doesn't refer to the person or thing who is doing the reporting or who is reporting on the activities which are being covered.

The Witness: You lost me there.

The Court: Once again, it has nothing to do with the individual who makes the report?

The Witness: No, sir.

The Court: It has nothing to do with the particular instrument, the particular machine as distinguished from another machine of the same type?

The Witness: No, sir.

The Court: It merely is a label for a particular type of chart used in testing a particular type of machine?

The Witness: Yes, sir.

Q. Will every unit which gives the signal GN at minus 50 degrees Centigrade give similar signals at other points?

A. Yes, sir, within the specified limits.

The Court: I am not sure I understand that. I will have to ask you what you meant by your answer.

The Witness: All units that were calibrated and given [fol. 97] the signal GN will have the same identical—

Q. At minus 50 degrees Centigrade.

A. At minus 50 degrees Centigrade, will have the same chart in relationship to the temperature column, only.

The Court: So that if a particular machine gives a signal GN when the machine is at minus 50 degrees Centigrade and another machine will give the same signal GN when that radiosonde is at a temperature of minus 50 degrees Centigrade, if each of the machines is then put in a temperature of minus 60 degrees Centigrade each will give an identical signal which, for purposes of illustration, we will say is GK?

The Witness: Yes, sir.

Q. Now with respect to Exhibit 7 for Identification, another calibration chart, up in the upper right-hand corner there is a place for initials, is there not? And what are the initials?

A. I am afraid the contractor or the person—

The Court: You don't know? All right, don't tell us.

Q. What are the symbols on the chart?

The Court: Don't have him read it if he doesn't understand it.

Mr. Caner: I was just going to ask what they are.

Q. There is GW in the upper right-hand corner, is there not?

A. Yes, sir.

Q. According to that chart what should the unit to which that chart is applicable send at minus 50 degrees Centigrade?

[fol. 98] A. The code letters GW.

Mr. St. Clair: May I see it? (Examining.)

Mr. Angoff: Your Honor, while he is looking at that, I think I have the last associate of mine who sweated all summer over these gadgets, and if I am not here they can go into it. Mr. James McConnell Harkless. I think he is the last one.

The Court: He may enter his own appearance, but I am glad to have him here.

Q. With the information given at the temperature test point 2 and the temperature test point 3, is it possible to calibrate the unit for temperature?

A. Yes, sir.

Q. What is then done by way of calibration? Is there any operation that has not been explained?

A. Based on these two readings a chart is made for that unit showing the temperature that that unit will show or transmit at various levels.

Q. Now turning to humidity, what is the first operation performed in calibrating for humidity?

A. The first operation is done at Position E, which is in the top part towards the left of the diagram.

The Court: In the top row, the fifth item over.

Q. What equipment is located there?

A. That is a box, a wooden box which measures roughly [fol. 99] 6 feet high, about 8 feet long and about 2 feet deep and inside it has a tub to hold water and it has some heating elements.

The Court: What are those?

The Witness: Heating elements are to heat the air.

The Court: Heating elements the 12-year old child doesn't understand. He wants to be told what it is.

The Witness: It has something like an oven that warms up the air in the chamber.

The Court: The ovens are over the tub?

The Witness: I don't recall right now just the position that they were in, sir.

The Court: I am not quite clear whether the ovens heat the tub or the ovens heat the air.

The Witness: The chamber or the box had to be maintained by the oven at a temperature of 80 degrees.

The Court: If you don't mind, you are not answering my question. I don't know whether the ovens heat the tub or not. Do they heat the tub or are they under the tub and heating it or heating the air over the tub?

The Witness: I don't recall the exact operation of that one there right now.

Q. In any event they maintain the temperature of the chamber at 80 degrees Centigrade; is that correct?

A. Yes, sir.

The Court: When you say oven, this little child doesn't [fol. 100] know whether you are talking about an oven which burns coal or the like or talking about an oven in the sense of an electric oven which radiates heat. What sort of oven is this?

The Witness: It is an oven that has elements in it—

The Court: Elements? This 12-year old child doesn't know what the word "element" means?

Q. Is the element a piece of metal?

A. Yes.

Q. Is it plugged into something so that electrical current can be passed through it?

A. Yes, sir.

Q. And the resistance of the metal when the electricity is passed through it causes it to heat up?

A. Yes, sir.

The Court: It looks like one's electrical heater that you use in your house, if you plug it in you get warmth in the winter?

The Witness: Yes, sir.

Q. It is this device which heats up the chamber?

A. Yes, sir.

Q. This chamber, is it 80 degrees Centigrade—is it supposed to be kept at any particular relative humidity?

A. Yes, sir.

Q. What?

A. 90 per cent.

[fol. 101] Q. How is that done?

A. That is done by the operator pushing a button. He has several buttons to push and he is able to adjust the warm air—

The Court: What does the button do?

The Witness: It controls a fan which—

The Court: Regulates the speed at which the fan operates?

The Witness: Yes, sir.

The Court: If you press the button further down does the fan go faster?

The Witness: No, it is the length of time you press the button. The fan operates at a uniform speed and the amount of time that you have the finger on the button controls the amount of air that will be introduced into the chamber.

The Court: And the operation of the fan is the control of the humidity?

The Witness: In relationship with your pieces of metal which are heated through an electric current, being immersed in the tub of water.

The Court: What is immersed in the tub of water at this stage?

The Witness: The metal heater, the electric heater.

The Court: The heaters are actually in water?

The Witness: Yes, sir. We are going into another oper-

[fol. 102] ation.

The Court: Who is "we"? I don't know who is going with you, but I am not. I don't understand where I am going.

Q. We are talking about Position E now. Is that where the elements or pieces of metal are located which are immersed in water?

A. Yes, sir.

Q. And by heating up these pieces of metal immersed in water it is possible, I take it, to control the humidity in the chamber?

A. Yes, sir.

Q. As well as the temperature?

A. Yes, sir.

Q. And it is possible to maintain the chamber at a temperature of plus 80 degrees Centigrade and a relative humidity of 90 per cent; right?

A. Yes, sir.

Mr. Angoff: Your Honor please, the District Attorney is testifying.

The Court: Oh, he is helping to get the scientific facts before us, which are really complicated—

Mr. Angoff: You will see why later—

The Court: If you can bring out more on cross-examination, so much the better.

Mr. Angoff: You will see why later I would rather have [fol. 103] him testify. I will withdraw my objection.

The Court: The objection to the leading question is overruled.

Q. Having brought that chamber to the point of temperature and humidity, what is done next?

The Court: Who does what next?

Q. Is there a worker at this position?

A. Yes. This position is used to condition the hair elements used in the radiosonde.

Q. Will you point out the hair element again?

A. I don't want to disturb it now.

The Court: You don't have to because the appellate court couldn't see it, anyway. Please describe it in words so that not only this Court but the next Court knows what you are talking about.

The Witness: There is a series of human hair tied on

one end and also on the other end and suspended between the two ties.

The Court: How many strands of hair would you say there are?

The Witness: Nine series of four strands each. It is thirty-six all together.

The Court: And how are the bundles of nine related to one another? Are they all held by the same holder at each end of the hair? Don't show me, tell me, because the ap-[fol. 104] pellate court won't see that.

The Witness: There is a series of nine segments of hair and each segment is composed of four hairs and these are suspended between two anchors which are used to hold them together.

The Court: You mean anchor No. 1 has 36 ends and anchor No. 2 has 36 ends?

The Witness: Yes, sir.

The Court: The ends are so divided into nine clusters of four each so that they are separated for some purposes, what purposes we don't yet know; is that right?

The Witness: Yes, sir.

The Court: All right.

Q. How long are these hairs conditioned in the chamber?

A. Not less than 6 hours.

The Court: Not that it probably has any significance, but are they strands of men's or women's?

The Witness: Mostly women's.

The Court: Do they all have to come from the same woman or can you pluck one one day and one another?

The Witness: All I know is that they have to be virgin hair.

The Court: What? (Laughter.) What do you mean by "virgin hair"? It certainly doesn't mean what it sounds like.

[fol. 105] The Witness: That is hair that has not been subjected to dyes or any cosmetics, and so forth.

The Court: You mean hair in its natural state?

The Witness: Yes.

The Court: It has nothing to do with being a virgin?

The Witness: No, sir.

The Court: All right. Does it have anything to do with the age of the person?

The Witness: I can't answer that, sir.

The Court: This is the most spurious virgin hair that—I would like to know, really, what it is that you are describing. Is it the hair of a child?

The Witness: I couldn't tell you the answer, sir, whether it would be child's hair or a young lady's or an old lady's. That is something that would have to be answered by engineers that specialize in that particular field.

The Court: I have recently seen some witch doctors in Ghana and Nigeria but I must say nothing they offered in the way of juju was any more mysterious than your leaving this hair. I can't tell whether it is like the monkey's skull—

The Witness: It is human being hair, mostly women's.

The Court: You don't know anything about it?

The Witness: No, all I know, at the present time we are having difficulty procuring.

[fol. 106] The Court: There are plenty of women but maybe not plenty that meet your description, but I don't know.

Q. Is this humidity conditioning chamber used for anything besides conditioning the hair?

A. Yes, it is used for conditioning samples being tested by the—

Q. But apart—

Mr. St. Clair: Let him finish, please.

Q. Apart from—

Mr. St. Clair: Please.

The Court: Please finish the answer. Read the question.

(The question and answer are read.)

The Witness: —the contractor.

The Court: The what?

The Witness: The contractor.

Q. What do you mean?

The Court: I don't understand that at all.

The Witness: Production personnel.

The Court: Will you read the whole of that answer?

(The reporter complies.)

The Court: Can you expand that answer and make it a little clearer for me?

The Witness: The radiosonde unit, before you can run a humidity check you have to condition the hair elements [fol. 107] in this chamber.

The Court: My 12-year old child is lost on "conditioning hair." The child knows what hair is but doesn't know what conditioning hair is. He probably knows what an air conditioner is, but not hair conditioning.

The Witness: The hair is put in a box where the air is moistened so that the hair can absorb some of this moisture and stabilize itself.

The Court: Stabilizes itself? What does that mean? The hair is put in a tank or box where the air is moist or humid; right?

The Witness: Yes, sir.

The Court: It is kept in that box for a period of time until its flexibility is uniform, or what?

The Witness: Its elongation and flexibility is uniform.

The Court: Until its elongation and flexibility—in other words, it will not stretch any more or contract any more and it will not bend with any greater difficulty or less difficulty. It has reached that point at which its reactions to stretching and to bending and the like are uniform; is that what happens?

The Witness: Yes, sir.

Q. Now, is the humidity conditioning chamber E used in any other way in connection with calibrating the unit for humidity?

[fol. 108] A. No, sir.

Q. What is the next operation in calibrating for humidity?

A. The next operation is at Position 6, which is the first row on the top about the seventh item over from the left.

Q. Described as humidity zero set.

A. That is a chamber similar to the chamber that was just described.

Q. What is done there?

A. The units are adjusted for the humidity at the 90 degree—90 per cent, at the code letters MX.

Q. You may refresh your recollection from the chart, if you wish. I show you Government's Exhibit 6.

A. That is NA. The code letters NA for 90 per cent. That will be the left-hand half of the chart, the code letters NA and the reading under RH, per cent, 90.

Q. Do I understand, then, that this humidity conditioning chamber is maintained at a relative humidity of 90 per cent?

A. Yes, sir.

Q. And does it have a device which permits the signals given off by the radiosonde to be recorded?

The Court: The signals to be recorded? That isn't what you mean, is it? Did it have a device for recording signals, first. Right?

Mr. Caner: Yes.

The Court: All right, does it have a device for recording [fol. 109] signals?

The Witness: No, sir. It had a device for audible listening.

The Court: You mean it has a device for receiving signals?

The Witness: It has a device where the signal being transmitted by the radiosonde is audible to the human ear.

The Court: It has a device for transmitting audible signals? Does it have that?

The Witness: Yes, sir.

The Court: And it has a device for transmuting those signals into some form where they can be understood by a human being?

The Witness: Yes.

The Court: First, what they do by way of transmitting signals. I don't understand how they transmit them, these radiosondes.

The Witness: The code disk, the group section moves

—goes by the needle for the humidity. It sends out dots and dashes and this is sent to a piece of radio equipment.

The Court: Where is that?

The Witness: That is attached to the humidity zero set station.

The Court: This radio equipment is a separate unit?

The Witness: It is a separate unit used in conjunction [fol. 110] with that.

The Court: Without suggesting it is in any detail like the home radio receiver, it is, in general, analogous?

The Witness: Yes, sir.

The Court: Does a human being operate that radio receiver?

The Witness: Yes. All he has to do is push the button.

The Court: What comes through? Dots and dashes?

The Witness: Yes, sir.

The Court: So that you really get a record which is transmitting dots and dashes to a radio receiver which emits sounds which are heard exactly as one would on a short wave radio at home and hear the dots and dashes on that band which has to do with signals from ocean-going vessels?

The Witness: Yes, sir.

The Court: Simple as that?

The Witness: Yes, sir.

The Court: Even your 12 year old got that one.

Q. If the radiosonde being calibrated does not transmit the signal NA at 90 per cent humidity what is done, if anything?

A. The operator has to turn a screw which is the adjustment screw and it either turns clockwise or counterclockwise until he gets the dots and dashes symbolizing the code letters NA.

Q. On the basis of that setting is it possible to make up [fol. 111] a chart for the humidity aspects of the radiosonde?

A. The charts for the humidity are standard. The results from this test does not set up any calibration for the unit. It is just to make sure that the unit does correspond with the standard chart.

Q. Now I believe that this device is in working order and I ask if you will now demonstrate this sample unit, substituted Exhibit 1, and show us how it works.

The Court: As you demonstrate it you must use words which will be understood in the cold record when this reaches an appellate court, if it ever does reach an appellate court. You are now engaged in a process of sending signals to a distant court as well as to the one in front of you and you require as much verbal skill as the instrument requires physical skill. Do you want to think about it and rehearse it with counsel before you testify? Would you like to take a recess and run through it and come back here at two o'clock and then you can do it quickly, because it is very important that this should be stated in a way in which the Court of Appeals, as well as the Jury and myself, can understand it. Take a recess.

(Luncheon recess.)

[fol. 112]

AFTERNOON SESSION

CONSTANZ PALLIOTTO, Resumed

Direct examination.

By Mr. Caner, Continued:

Q. Mr. Palliotto, now that we have calibrated the unit, I ask that you demonstrate its operation.

The Court: Speaking in such a way that your words will carry meaning to somebody who does not see you perform an operation so that, for example, if you pick up a piece of string you say, "I am now picking up a piece of string." If you point at a needle you say, "I am pointing at a needle." Remember that quite literally the Court of Appeals is blind to what you are doing.

A. You have a receiver which is equivalent to something like your home radio. I am now turning the receiver on.

The Court: Turning on the, whatever you call it, button at the left. What do you call that?

The Witness: The knob at the extreme lower left-hand corner.

The Court: And it is labeled?

The Witness: It is labeled, sir.

The Court: What is it labeled?

The Witness: Off, Stand By and On.

Q. Now the mechanism which you have just turned, is that part of the radiosonde or not?

A. It is not connected directly to the radiosonde.

The Court: What is it called?

[fol. 113] The Witness: It is called a receiver.

Q. This type of receiver is not contained in the radiosonde?

The Court: It may be labeled Exhibit A for Identification.

Mr. Caner: It need not be an exhibit, so far as the Government is concerned.

The Court: It need be for identification so that the Court of Appeals can know what he is talking about.

Q. Now you have turned a dial on this receiver, have you not?

A. Yes, sir.

Q. Are you going to do anything else?

A. At this time I will set the button on the radiosonde unit to the On position.

The Court: Will you tell us what you hear? Signals of dots and dashes like a radio-telegraph? You have to describe what you hear, you know, or it won't be on the record.

Q. What do you hear?

A. I hear signals consisting of dots and dashes. These signals represent the signals being given off by the radiosonde.

The Court: Maybe we have a telegraph operator. Is it fair to say there is a repetition of letters and it sounds

like call numbers, if you were a radio amateur listening to call numbers? Is that right?

[fol. 114] The Witness: Yes, sir.

Q. Will you tell us what the dots and dashes are and what they represent?

A. The dits and dashes—

The Court: Dits or dots?

The Witness: Well, dots. The dots and dashes represent letters which are listed in the Morse Code.

The Court: These letters would tell anybody who is familiar with the Morse Code the letters of the alphabet?

The Witness: Yes.

Q. What is it you hear?

A. Dots and dashes.

Q. What dots and dashes?

The Court: He hears dots and dashes.

A. The series of dots and dashes for Pressure.

The Court: Wait a minute. How do you know they are for Pressure? Would they sound any different if they were for Temperature?

The Witness: They may, sir.

The Court: How do you know?

The Witness: By reading the amount of dots and the amount of dashes in a code group.

The Court: You mean by listening you can tell whether that is Temperature or Pressure or Humidity?

[fol. 115] The Witness: By the spacing.

The Court: Can you tell?

The Witness: By the spacing.

The Court: You mean by the space between the letters?

The Witness: Between the letters.

The Court: The spaces are different for Pressure than for Temperature and for Humidity?

The Witness: The spacing between the letters between the Pressure and Temperature and between Temperature and Humidity is about the same.

The Court: How can you tell what we are listening to? Maybe you know, but how do you know?

The Witness: The first code group is the Pressure.

The Court: How do you know? Is it the pitch?

The Witness: No. It is by the interval between dots and dashes.

The Court: I can realize the interval is a little longer than it would be if a telegraph operator was operating a railroad telegraph key. But do you know with absolute accuracy or proximate accuracy by the interval between letters what kind of signals they are, that is, whether they relate to Humidity, Temperature or Pressure?

The Witness: Yes.

[fol. 116] The Court: What are we listening to right now?

The Witness: That is Humidity. (A pause.) That is Pressure. (A pause.) That is Temperature. (A pause.) That is Humidity.

The Court: In other words, you are so trained that you can tell the time interval accurately enough to know the three kinds of signals?

The Witness: Yes, sir.

The Court: All right.

Q. Now there is a pause between the signal groups, is there not?

A. Yes.

Q. As I unders[illegible] your testimony previously, the signals would be tra[illegible]ted a quarter of the time and there would be silence [illegible]hree-quarters of the time, is that correct?

A. Yes, sir.

Q. After the silence of three-quarters what is the first group of signals that you hear?

A. That would be Pressure.

Q. Then after the Pressure signals is there a pause?

A. There is a pause.

The Court: Am I to understand that always after the period of a pause the Pressure signals are the first ones?

The Witness: No.

The Court: Well, that is what you answered. Therefore, [fol. 117] you had better consider it more carefully. After a pause of the signals, are the signals always from the

same field, that is, always from the field either of Pressure or Humidity or Temperature, or may it be different under different circumstances?

The Witness: I don't quite follow that.

The Court: Well, there is a pause?

The Witness: Yes.

The Court: There are three types of possible signals: a signal which relates to Pressure; second, a signal which relates to Humidity; third, a signal which relates to Temperature. After the pause is the signal which first comes over always in the first category, the Pressure category?

The Witness: Yes, sir.

The Court: Always?

The Witness: Yes, sir.

The Court: No exceptions?

The Witness: No exceptions, sir.

The Court: And is the second signal always Humidity?

The Witness: No, sir.

The Court: Is it always Temperature?

The Witness: Yes, sir.

The Court: Always?

[fol. 118] The Witness: Yes, sir.

The Court: Is the third signal which comes over always Humidity?

The Witness: Yes, sir.

Q. Can you tell us what signals are being transmitted now by the mechanism?

A. The dot—

The Court: Dot and two dashes?

The Witness: Dot and two dashes, a W. The dot dash and two dots was an L. That signifies the code letters of the Pressure level at that particular spot in the atmosphere in which the radiosonde is.

The Court: What caused that rise in the pitch?

The Witness: I changed—

The Court: You put your hand on the instrument?

The Witness: Yes, sir.

Q. Are you assuming that that instrument is accurate? Will you tell us what the Pressure being indicated is?

The Court: We are more interested in the Temperature than the Humidity.

A. Removing the chart which comes from the unit I will check WL on the chart. WL on the chart for Pressure reads: 1,010 millibars.

The Court: By the way, presumably in a room like this you are getting a recurrent set of signals: one signal for [fol. 119] Pressure, one signal for Humidity and one signal for Temperature, being repeated over and over again. That is to say, if the conditions in this room do not vary from the point of view of Humidity and Temperature as we sit here, you will get a repetition of the same signal, won't you?

The Witness: Yes, sir.

The Court: So that is why you were so easily persuaded that WL is the constant report on Pressure, is that right?

The Witness: Yes, sir.

The Court: Now let us have the constant report on either Humidity or Temperature.

The Witness: The second group of letters was three dots—

The Court: S?

The Witness: —which is S. And three dots and a dash, which is V.

The Court: Three dots and a dash together?

The Witness: Yes, three dots and a dash.

The Court: Let us hear that again, so we all hear three dots and then three dots and a dash. Can you make it louder?

The Witness: Yes.

The Court: I certify for the record that is what it does.

[fol. 120] Q. On the chart which comes with the unit, the code letters SV show that the temperature in the atmosphere which this unit is at at the time is 28.8 degrees Centigrade?

The Court: Which is in Fahrenheit, just for our information, what?

The Witness: Sir, I don't remember. It is five-ninths or nine-fifths. I'm sorry. It is approximately 78 or 79 degrees.

The Court: What does the Defendant say it has been calculated at?

Mr. St. Clair: I think it is five-ninths.

Q. Will you tell us what the Humidity signal is, please?

A. The Humidity signal transmitted three dashes for the first letter and a dash and a dot for the second letter. That represents the code group ON. ON on the chart for Humidity reads 65 per cent.

The Court: I think the jury would certify that that is correct. What we are watching or listening to and observing is in many respects similar to the report which a Sputnik or similar orbiting object does in the way of sending signals, is that right?

The Witness: Yes.

Mr. Angoff: Echo II, your Honor.

The Court: That is more patriotic.

Q. You may turn the device off. Now passing to a dif-
[fol. 121] ferent subject, were you familiar, Mr. Palliotto, with the contract documents under which the radiosondes were produced?

A. Yes, sir.

The Court: In what sense were you familiar with them? Were you a party to their negotiation?

The Witness: No, sir. I had copies.

The Court: You mean you read them?

The Witness: Yes, sir.

The Court: He can't testify about their content, if that is what you propose to have him do.

Mr. Caner: I am going to ask him to identify them.

The Court: Maybe everybody agrees they are the contracts. Let us not go through all that unnecessary procedure.

Mr. Angoff: Haven't we already agreed they are the contracts?

Mr. Caner: These are subsidiary contract documents, the specifications—

The Court: I am sure you can agree on those.

Mr. St. Clair: The Defendant Standard Coil—

The Court: Is one related to the first contract, Exhibit 2?

Mr. Caner: No. These two documents relate to both contracts. They are incorporated by reference in the con-
[fol. 122] tracts and referred to in them.

The Court: You mean they are already in the contract and in exhibits?

Mr. Caner: No. The contracts refer to them by name.

The Court: Well, therefore, they are part of the contract.

Mr. Caner: They are incorporated by reference. The contracts haven't been offered yet.

The Court: Exhibits 2 and 3 are enlarged to include everything referred to in Exhibits 2 and 3.

Mr. Angoff: No objection.

Mr. St. Clair: No objection.

The Court: They are now part of Exhibits 2 and 3, in the case of Exhibit 2, this being the 6th part, it will be Exhibit 2-E; in the case of Exhibit 3, this being the third part, it will be Exhibit 3-C.

Mr. St. Clair: Perhaps, for the record, we should differentiate which is which.

The Court: All right. One relates to the 28th of May, 1956; the other relates to the 6th of May, 1957.

Mr. Caner: No. If the Court please, these two documents both refer to and are included in both contracts. The contracts are MILR-11005B, which are the specifications applicable to both contracts.

[fol. 123] The Court: That will be regarded as both Exhibit 2-E and 3-C. It will be used alternatively, having both numbers, it being used as part of Exhibit 2 and part of Exhibit 3.

The second document is what?

Mr. Caner: MILSTD-105.

The Court: That is Exhibit 2-F and will also be known as Exhibit 3-D. It is given two numbers because it is the same text used once as part of Exhibit 2 and another time as part of Exhibit 3.

(Specifications MIL-R-11005B marked Government's Exhibit 2-E and Government's Exhibit 3-C; MIL-STD-105A, Sampling Procedures and Tables For Inspection By Attributes, marked Government's Exhibit 2-F and Government's Exhibit 3-D.)

Q. Now, generally speaking, what is the subject matter of MILR-11005B?

Mr. Angoff: I object.

The Court: The objection is sustained.

Mr. St. Clair: May I interrupt? Isn't it 105A? Is that the correct designation?

The Court: You can't ask the witness about this contract. [fol. 124] He had nothing to do with the negotiation and isn't anybody to testify with respect to it.

Mr. St. Clair: May the record show the reference to MILSTD-105 was 105A?

The Court: Yes.

Q. Did you have a copy of MILSTD-105A?

A. Yes, sir.

Q. Does MILSTD-105A state who is to decide on what sampling plan —

(Mr. St. Clair rises.)

The Court: The objection is sustained. He is not a man to construe the document. He can tell you what he did pursuant to the document.

Did you read something and then do something?

The Witness: Yes, sir.

Q. Would you tell us whether all the units—

The Court: All the what?

Q. Will you tell us whether all the radiosondes produced under the contracts were tested?

A. No, sir.

Q. Were some tested?

A. Yes, sir.

Q. How was it determined?

The Court: The passive is as objectionable in a question as it is in an answer. Who determined?

[fol. 125] Q. Who determined which radiosondes were to be inspected?

A. The Government inspector.

The Court: Who? The Government inspector whom?

The Witness: The Quality Assurance Representative.
The Court: Is that a title of the Government officer?
The Witness: That is the title of a Government inspector.

Q. Whose title?
A. The Government inspector at the plant.
Q. Who was that?
A. Myself, sir.

The Court: Well, in other words, "I determined", is the answer?
The Witness: Yes, sir.

Q. What factors did you take into account in determining which units should be tested?
A. Based upon the amount of the large sums—

The Court: No. "I followed the following method—"
What method did you follow? Maybe I didn't follow any method.
Mr. Caner: Excuse me, your Honor. I asked him what factors did he take into consideration in deciding what units were to be tested.
The Court: What factors did you personally take into [fol. 126] consideration?
The Witness: I don't quite follow or understand that question.
The Court: Well, did you take into account some factors, as for example one I am sure you didn't take into account —the location on the first floor or second floor? Did you take that factor into account?
The Witness: Yes.
The Court: You did?
The Witness: Yes.
The Court: Which floor did you examine?
Mr. Caner: Let me withdraw the question and go at it a different way.
The Court: All right.

Q. Were the units submitted to the Government inspector?

The Court: I will not allow the passive as the basis of a question. You will please put it so that the answer comes

in the active, and I know who does something and what he does.

Q. Did the contractor, Standard Coil, submit radiosondes?

The Court: There is no such thing as the contractor, Standard Coil. You will have to ask about an individual. Corporations act only through individuals. They are never seen in the world-at-large.

Q. Did any agent of Standard Coil submit radiosondes [fol. 127] to the Government inspector?

(Mr. Angoff rises.)

The Court: He can answer that Yes or No. Did any agent submit to you radiosondes?

The Witness: Yes.

The Court: What is the objection? It seems to be a perfectly proper subject.

Mr. Angoff: Is he going to determine who is an agent and principal?

The Court: Well, that is a perfectly valid objection. Did any person employed by Standard Coil talk to you about this subject?

The Witness: Yes, sir.

The Court: Who was the person?

The Witness: Mr. Fong Foo.

Mr. Angoff: That is what I was driving at, your Honor.

The Court: We are both engaged apparently in primary lessons. All right.

Q. Were the radiosondes submitted to you singly or in groups?

A. In groups.

The Court: Didn't I just say you are not to say "were they?" You must ask whether Mr. Fong did it because—

Mr. Angoff: It is Mr. Foo, your Honor, not Fong.

The Court: Mr. Foo. I am sorry.

[fol. 128] Q. Did Mr. Foo—

The Court: Remember, there is an individual who is charged here at the bar with a crime, and it is of the greatest importance that we know who does what.

Q. Did the Defendant Foo submit radiosondes to you singly or in groups?

A. In groups.

Q. In groups of how many?

A. Approximately 200.

Q. And was any name given to these groups?

The Court: "Was any name" is objectionable. Did Mr. Foo give any name?

Q. Did Mr. Foo give any name to these groups?

A. Yes.

Q. What name?

A. They were submitted—

The Court: No, not "They were submitted." Mr. Foo did something or did not.

The Witness: Mr. Foo submitted lots of material for mechanical visual inspection or calibration inspection or final packing inspection.

Mr. Angoff: Just a moment. I object. I would like to pin the time down because there are two contracts. It might have been September, 1957; it might have been in 1956.

[fol. 129] The Court: That is a perfectly valid objection.

Mr. St. Clair: May I move that the answer be stricken as not responsive?

The Court: Yes. It is struck.

Q. Starting at the beginning of the contract, September, 1956, did the Defendant Foo submit radiosondes to you singly or in groups?

Mr. Angoff: Just a moment. Your Honor, is it on Temperature inspection? Is it on Pressure inspection? Is it on Shock inspection? Or is it on Humidity?

The Court: Those are perfectly proper questions to follow the one which has heretofore been answered.

You may ask for what purposes the Defendant Fong submitted, if he stated for what purposes he submitted them.

Q. Do I understand your answer was: 200 groups—groups of 200?

A. Approximately.

Q. All right.

The Court: You had better find out. Did you ask him for those radiosondes for a particular purpose? Did you?

The Witness: No, I didn't.

The Court: Did he tell you the purpose for which he was submitting them? Did he use words?

The Witness: Written.

The Court: All right. Do you have the writing with [fol. 130] you?

The Witness: No, sir. It is not available now.

The Court: Is it lost as far as you know?

The Witness: No. We have it available at the office somewhere.

The Court: Well, let's get it.

Q. You have reference to the test data submission sheets, do you not?

A. Yes.

Mr. Angoff: Your Honor—

The Court: They are the best evidence, and it is of the greatest importance. He is being charged here with respect to a very serious crime, and the question is with respect to the submission of these instruments for a particular purpose of examination, and apparently he gave his instructions in writing. I am not going to allow the witness to say what the instructions were because the instructions still exist in writing.

Mr. Caner: I am not going to ask him what the instructions were.

The Court: You have to before you can go ahead.

Q. How many submission sheets were there approximately?

A. 600 or 700.

Q. How many submission sheets were there with respect to each lot?

[fol. 131] A. Five.

Q. How many lots were there in each of the contracts?

A. I would have to refer to my notes here.

Q. You may do so.

A. 200 lots were submitted.

The Court: Not "were submitted." Did the Defendant Foo submit 200 lots?

The Witness: Yes, sir.

The Court: Will you please remember that, just as I cautioned Mr. Caner, I do not want the use of the passive. If a particular act was done by a particular person you will please use the form of statement making it clear that X, the particular individual, did such-and-such a thing? This is of cardinal importance in a case in which two individuals are charged with each having done particular wrongful acts which involve alleged false reporting to the Government.

Q. Is this figure of 200 inclusive of both contracts?

Mr. Angoff: I object, your Honor.

The Court: He may answer that. Were they from both contracts?

The Witness: Yes, sir.

Mr. Angoff: Aren't we circumventing the best evidence rule?

The Court: We are not circumventing anything. We are [fol. 132] only laying the groundwork for the introduction of these written orders.

Mr. Angoff: If they are here.

The Court: Well, I said that I am not going to allow any testimony that is not from these written orders as long as they exist. They are the best evidence and they are essential. If you need a recess to get them, I will declare a recess.

Mr. Caner: We can bring them, your Honor. I do not need a recess at this time. I have other questions to ask.

The Court: If you think you can go ahead, you can go ahead as far as I will let you.

Q. Now out of each lot was there any customary number of units which were drawn to be tested?

Mr. Angoff: I object.

The Court: Does that show on the orders themselves? I never looked at the orders. I never knew they existed until two minutes ago.

Mr. Caner: Well, it is a matter of fact, your Honor.

The Court: It may be a matter of fact, but it is a matter of record.

Mr. Caner: It is a matter which could be deduced from the records.

[fol. 133] The Court: It is a matter which can be computed, which is a different thing from deduce. I don't care for deductions or airy-fairy speculations. I want the facts. I declare a recess until we get the documents.

(Recess from 2.25 p.m. to 2.35 p.m.)

Q. Have you before you, Mr. Palliotto, the test data sheets submitted to you?

Mr. St. Clair: If your Honor please, I understood we were going to have the submission sheets.

The Court: That is what I understood.

Q. Do you have the submission sheets?

A. Yes, sir.

Q. Do you have any other test data sheets that were submitted to you?

The Court: Wait a minute. "test data sheets". I don't understand. If you understand it, you will have to define it in the question.

Q. Would you first explain to us what a submittal sheet is?

The Court: Submittal or submission?

Q. Which is it called?

A. Submission sheet.

Q. What is the submission sheet?

A. It is a form on which is listed the contract number, the lot number, the date, the material being submitted, the type of testing required and the signature of the con-

[fol. 134] tract representative submitting the material.

Q. I show you—

Mr. Angoff: Didn't you leave out that the Government inspector's signature is on there too?

Mr. Caner: Just a minute, please.

Q. Is the submission sheet a printed document?

A. The insertions—

The Court: Wait a minute. It certainly isn't a printed document. Is it a printed form with typewritten inserts? Is it a printed form with handwriting on it? What is it?

The Witness: It is a printed form with handwriting on it.

Q. I show you a paper, actually a number of papers. The top paper is a yellow paper.

Mr. Angoff: I have no objection to introducing the submission sheets.

The Court: We will take a model submission sheet and mark it as the next exhibit, which is Exhibit 9.

(Model Submission Sheet marked Government's Exhibit No. 9.)

The Court: Is this a model submission sheet?

The Witness: That is a model submission sheet.

The Court: Will you now show it to the jury, because I am sure some of the questions—

[fol. 135] Mr. Angoff: Just the top sheet, your Honor?

Mr. Caner: That is right.

The Court: All right. You don't have to make it yet. Just pass it around, the top sheet only. Rip it off from the rest, please.

Mr. Caner: Yes, sir.

The Court: Give the jury a minute to look at it. I don't mind looking at another one, if I may. You don't have to rip it for me.

(Submission sheet handed to the Court.)

In spite of the fact it was referred to as a printed document, it is obviously a mimeographed document. On this I see the letters AN, which you have described as Army-Navy, and AMT, which you have described as being—

The Witness: —Airborne Meteorological.

The Court: I see also AQL-% Major and AQL % Minor. What does the AQL mean?

The Witness: AQL is the Average Quality Level.

The Court: In response to that question of course an answer might be different depending upon the quality.

Were there several standards like A, B, C, D, E, or were there no symbols that were always used for quality?

The Witness: There was a numerical number assigned to quality and in percentage figures.

The Court: 100% down to zero?

[fol. 136] The Witness: Yes, sir.

The Court: From the copy in front of me, I take it that is not the only method of reporting quality. Were there other methods?

The Witness: Yes, sir. Relative to the type of defects, whether they were major or minor or control.

The Court: Would it be possible to use something like a symbol "Okay" instead of percentage?

The Witness: Yes.

The Court: Is it fair to say that the particular person filling out the form never received instructions from you as to what to use by way of a symbol?

The Witness: No, sir.

The Court: Were you the one who filled out these forms?

The Witness: Some of these forms, sir.

The Court: Did you give instructions to other people on how to fill them out?

The Witness: Yes, sir.

The Court: When you gave instructions with respect to the column headed AQL what did you say? They were to fill it out how?

The Witness: The column is filled out with relation—

The Court: No. What did you say?

[fol. 137] The Witness: To fill the column out. If the unit was okay, the tests on the units were okay for Temperature, to fill it out okay; if it was not, to list the defect, whether major or minor, and what type of defect.

The Court: What do you say about your earlier testimony that you told them to put down percentage terms?

The Witness: I did not state "to put down percentage terms."

The Court: I didn't invent it.

The Witness: I explained the AQL per cent.

The Court: I understood you to say that in filling out the columns under that heading, the person who was to fill them out was told by you that he was to fill them out

100 per cent or something lower down to zero per cent. Did you give such instructions?

The Witness: No, sir.

The Court: What instructions did you give?

The Witness: To fill out the sheets, the Government inspector, after—

The Court: No. What did you tell him to do with respect to that column?

The Witness: With respect to that column, I told the Government inspector to put down the actual results that he witnessed on a lot.

The Court: Did you tell him how to show that the result [fol. 138] was satisfactory?

The Witness: If it was satisfactory to mark it okay, or put a check mark.

The Court: Either one was an indication the operation was satisfactory?

The Witness: Yes, sir.

The Court: What did you tell him to do in case the operation was unsatisfactory?

The Witness: Then he was supposed to mark under the heading Major or Minor or Control a relationship to the severity of the defect that he found and to list on the submittal sheet what the defect was.

Q. Was the submittal sheet entirely filled out when it was submitted to you?

A. No, sir.

Q. What part of it was filled out?

A. The upper half was filled out by the contractor.

The Court: Please. I have told you, and I repeat, and I cannot overemphasize the point, that you are not to use vague abstractions like "contractor." This little 12-year-old boy of yours wants to know who did what when.

Q. Who customarily signed the form in the line where it says "Submitted by"?

A. Mr. Al Sawyer.

Q. Do you know what his functions were?

[fol. 139] A. Yes.

Q. What were his functions?

A. Quality Control Inspector.

The Court: For whom?

The Witness: Mr. Fong Foo.

The Court: Are you telling me Fong Foo was an individual who was an employer?

Q. By whom was—

The Court: You are not telling me that?

The Witness: I don't get it.

The Court: You were asked for whom he was doing the business. Mr. Fong Foo was no employer of Mr. Sawyer, was he?

The Witness: No.

The Court: All right. Then please do not indicate that he was. I don't know whether you realize the seriousness of the case in which you are testifying. You are testifying in a criminal case in which two individuals are charged with a very serious crime, and you have just loosely referred to one of them as being somebody who was a person for whom another person by the name of Sawyer was working, and you know perfectly well that Mr. Sawyer wasn't working for Mr. Fong Foo, don't you?

Q. Who was Mr. Sawyer's superior?

The Court: That is a different question.

[fol. 140] A. Mr. Fong Foo.

Q. Will you point him out in Government's Exhibit 5?

Mr. Angoff: If your Honor please, aren't we getting away from the individual—

The Court: I don't know. This may be necessary in order to have the foundation of fact for the detailed examination.

Q. Will you point Mr. Sawyer out in the corporate hierarchy chart, which is Government's Exhibit 5?

Mr. Angoff: Doesn't the chart speak for itself?

The Court: It does. You may point it out yourself to the jury, since you have been invited to, Mr. Caner.

Mr. Caner: I would be happy to.

Mr. Angoff: No objection.

Mr. Caner: Right here (pointing to the chart).

Q. Now on the sample sheet before you whose name appears in the words "Submitted by"?

A. A. R. Sawyer.

Q. And there is a lot number, is there not, shown on the sheet?

A. Yes, sir.

Q. And the date?

A. Yes, sir.

Q. And when that sheet was submitted to you were those [fol. 141] lines filled out?

A. Yes, sir.

Q. Were any other lines filled out when the sheet was submitted to you?

A. Yes.

Q. What other lines were filled out?

The Court: By the way, do you have more of these yellow sheets you want to tear off and give to the jury, if you are going to ask a lot of questions about it?

Mr. Angoff: If your Honor please, I am going to suggest that all be given to the jury. There were submissions by many people, even on those handed to me by counsel, by Government counsel.

The Court: In other words, you suggest the sample is not entirely fair because it suggests they were all submitted by one person, Sawyer, when the fact is there were a number?

Mr. Angoff: Mr. Jones, Mr. Pemberton—

The Court: The whole group of submission sheets, every single one, is part of Exhibit No. 9. Will you please at an appropriate time put them all together, count them and deliver them to the Clerk?

Mr. Caner: I would be happy to, your Honor.

The Court: I am told, and I assume accurately, by Mr. Angoff, that an inspection shows there are a number of [fol. 142] different persons who made submissions on the yellow sheets. Is that correct?

The Witness: Yes, sir.

Mr. Angoff: On the ones I looked at, none of whom was Fong Foo.

The Court: As to that you will have a chance to make

an inspection yourself. It will be interesting if you then find out that not one was made by the Defendant.

Mr. Angoff: From the group he gave me.

Q. Were all made by people in the Quality Control Department?

Mr. Angoff: I object.

The Court: That may or may not be so. In any event, that raises a quite different question of law from the question if it had been done by the Defendant personally. I instruct the jury now that the question of law is not to be decided by counsel's interjection but will be the subject of a ruling by the Court at a later time and appropriate instructions to the jury relevant to the problem.

Mr. St. Clair: Which means Mr. Caner's remarks shall be disregarded?

The Court: Absolutely.

Mr. St. Clair: Thank you.

Mr. Mitchell: And Mr. Angoff's?

The Court: No. He was pointing out a fact.

Mr. Mitchell: He hasn't examined these all.

[fol. 143] The Court: He said that those he examined showed—that none he examined was in fact signed by the Defendant Fong Foo. He drew no conclusion of a legal nature. He made a factual observation as a short cut to the presentation of factual evidence, a statement which I am sure you don't dispute was an accurate statement of fact.

Mr. Caner: I do not dispute it. I make no dispute.

The Court: He does; you don't.

Q. Besides what has already been referred to, what other parts of the submittal sheet were filled out when the submittal sheet was turned over to you?

A. The item number, the quantity of the lot, the description, the serial number.

The Court: Would you please give more sheets to the jury?

(Submittal sheets handed to the jury.)

Q. Were the submittal sheets always—

The Court: Wait a minute, please. How many yellow sheets are in the jury's possession?

Mr. Caner: These are white sheets. I was going to bring out—

The Court: Will you please do what I say if I give an order? I want the yellow sheets in the hands of the jurors. I want the last question and answer read to the jury so [fol. 144] they can follow the testimony in the light of the exhibits heretofore introduced.

(The previous question and answer read.)

Q. Are all the submittal sheets of the same color?
A. No, sir.
Q. Some have another color?
A. Yes.
Q. Are they any different in form?
A. No, sir.

The Court: Now will you read back, please, the question and answer before the colloquy? I want the jury to know what was filled in and how it looked.

(The question and answer, previous to the colloquy, read.)

The Court: I don't think you appreciate the nature of the crime. This is a most serious matter. If you are not accurate how can you expect the Defendants to have been accurate in making computations?

Mr. Caner: I am attempting to be accurate, and I do appreciate the seriousness of the crime.

Q. Now at the time the submittal sheet was submitted to you was anything attached to it?

The Court: Will you please not use the passive? At the time Mr. Sawyer submitted to you—

Q. At the time Mr. Sawyer submitted to you that sub- [fol. 145] mittal sheet before you was anything attached to it?
A. Yes, sir.
Q. What?
A. A list of serial numbers of the radiosondes.

The Court: Will you please give us a sample, all of us, with the attachments?

(Mr. Mitchell hands document to the Court.)

The Court: That becomes Exhibit 10.

(Submission Sheet for Lot 89, dated April 23, 1957, marked Government's Exhibit 10.)

Q. Will you tell us what was attached to it?
A. A sheet of paper listing the chassis number being submitted for Government inspection.
Q. Anything else submitted?
A. No, sir.
Q. Does the submission sheet and document attached to it show how many units were sampled out of that particular lot?

Mr. Angoff: I object.
The Court: It speaks for itself.
Mr. Angoff: Yes. The second sheet is admissible.
The Court: The second sheet is in. That is Exhibit 10.
Mr. Angoff: Except it hasn't been identified as to who checked the—
[fol. 146] The Court: Well, there is no reason to believe at the stage they were received it was checked. I would like to be clear on that, however.
Mr. Palliotto, when Mr. Sawyer handed you a submission sheet of the type of Exhibit 9 there was, according to your testimony, attached to it a sheet similar to Exhibit 10. Will you please make it clear—when Mr. Sawyer handed you Exhibit 10 were there any check marks at that time on Exhibit 10?
The Witness: Some, very few more, and some—most were not.
The Court: Can you be more helpful in your answer? Can you tell us what kinds of checks were on there or what kinds of items were checked?
The Witness: The serial numbers may have had a little check mark, a little pencil jotting on the side, or they had nothing on the side at all and just contained a list of numbers.

The Court: Would you give me Exhibit 10, please, or one like it?

(Mr. Mitchell hands document to the Court.)

The Court: I have in front of me what corresponds with Exhibit 10. It has on it eight columns. It has, in addition to eight columns, room on the left of the eight columns. The first of the eight columns is called Serial, and instead [fol. 147] of the word number it has the number sign, that is two slants and two crosses.

Am I to understand that at the time Mr. Sawyer gave you an exhibit like Exhibit 10 the column headed Serial Number was filled in and the numbers were written down? Is that correct?

The Witness: The numbers were written down on a typed piece of paper.

The Court: At the time Mr. Sawyer gave it to you?

The Witness: Yes.

The Court: There are then seven columns to the right of the serial column. Were those columns blank when Mr. Sawyer gave you Exhibit 10?

The Witness: Sir, I don't know if you have the same sheet as I have.

The Court: I don't either. Give this to the witness, Mr. Tobin.

(Mr. Tobin, the Court crier, hands the document to the witness.)

The Witness: I must explain that this sheet, this sheet attached here, is one of the Government inspector's work sheets.

The Court: So it doesn't belong here at all?

The Witness: It doesn't belong here at all.

[fol. 148] Mr. Angoff: I move to strike.

The Court: I strike Exhibit 10 in accordance with the request. Will the Government please put in the hands of the witness a fair sample of what was attached?

Mr. Angoff: I think the jury has a copy.

The Court: Yes. Take from the jury these misleading exhibits.

I am quite prepared to take drastic action in connection with this case. I think the best thing would be to give you a recess for the balance of the day, and on Monday come in at 10:00 o'clock, and if the case at that time, in connection with this technical matter, is not so prepared that I feel the jury is getting a fair picture I am not going to submit anybody to the risks of this kind of confusion in this very grave case in which the charge is that the defendants have confused the Government with false and misleading reports.

The Court will adjourn until 10:00 o'clock on Monday.

(Whereupon at 3:00 p.m. the trial was recessed to Monday, September 19, 1960, at 10:00 a.m.)

[fol. 149]

THIRD DAY

Court Room No. 6
Federal Building, Boston
Monday, September 12, 1960

(Conference at the bench.)

CONSTANZ PALLIOTTO, Resumed

Direct examination.

By Mr. Caner, Continued:

Q. Now, you testified, Mr. Palliotto, that radiosondes were submitted to you for testing while at the plant.

A. Yes, sir.

Q. At the time the radiosondes were submitted, were they accompanied by any papers?

The Court: Submitted to whom?

Q. Submitted to you.

A. Yes.

Q. What papers were they accompanied by?

A. Submittal sheets.

Q. When were these submittal sheets submitted?

A. They were submitted sometime in the early part of October 1956.

Mr. Angoff: Shouldn't we get all these sheets now in evidence so that they will speak for themselves, finally and conclusively?

[fol. 150] The Court: The government has indicated that they choose to try the case without offering them. It is up to the government.

Q. Where are the submittal sheets now?

A. They are in the court room, on the desk.

Q. Besides the submittal sheets do you have any other records relating to tests?

A. Yes.

Q. What are the names of the tests to which the records relate?

A. The preliminary mechanical and visual; the pressure, temperature and relative humidity calibration; the operational test; and a final mechanical.

Q. Is the shock test included?

A. Yes, that is included.

Q. Now, will you tell us, generally speaking, what the mechanical and visual test is?

Mr. Angoff: If they are in writing, I would like to have the writing submitted.

The Court: First he can describe them in general, and then I will ask for the actual instruction sheet.

Q. What was the mechanical and visual test?

A. The preliminary mechanical and visual test was the examination of the radiosonde units which had been submitted to me in lots, and we checked—I checked for soldering, wiring, charts, parts defects, and if all of the components were there, and if any of them were damaged.

[fol. 151] Q. Did you test all of the radiosondes this way?

A. No, sir.

Q. Which of the radiosondes did you test?

A. Just the samples that I drew from the lot.

Q. How many samples did you draw from the lot?

A. Well, it varied in accordance with the amount of units in the lot.

Q. Well, give us an example.

A. Up to 180 units submitted to me in a lot, I would draw probably 25 samples.

Q. At what point on the chart did this test take place?

A. That would be on the middle left-hand end of the table; that would be the first table toward the top of the long table.

The Court: I am sorry; where did you say it took place? What is the name of the unit?

The Witness: I haven't got the sheet.

The Court: You may step down.

The Witness (complying): It took place at Position 1.

The Court: Well, will you please remember the record? The third one on the left-hand side, which says "Quality Control Test Area. Mechanical, visual and electrical inspection, prior to calibration"; is that it?

The Witness: Yes, sir.

Q. What was the operational test?

[fol. 152] A. The operational test was to run the radiosonde unit through the operation, electrical operation and to check if the transmitter and the motor and the unit was sending out a code of the specific temperature, pressure and humidity.

Q. Who performed the operational test?

A. I did.

Q. And where did you perform the test, pointing out the position on the chart, and reading it into the record?

A. The operational test was performed at Position 14, marked "Final Operational Station Sig. C."

Q. Now, with respect to the calibration test, who did the calibration test?

A. Standard Coil Products personnel.

The Court: That isn't a sufficient answer. Will you give us the name of the person or persons.

The Witness: Mr. Faria, George Faria, Jim Pembleton—

Q. Which of the tests did George Faria perform?

Mr. Angoff: Can we identify George Faria?

The Court: Who is George Faria, beyond being an employee of Standard Coil? What employee was he?

The Witness: He was an employee that ran the operational test, or the pressure calibration test.

The Court: Do you know anything else about what duties he performed? Did you observe him doing anything else?

The Witness: Yes, he also performed other functions for [fol. 153] Standard Coil Products on the radiosonde unit.

The Court: I know no more than I did before. What did he do?

The Witness: He ran the operational test, and ran the humidity test, and calibration of humidity units.

The Court: That is all you saw him do?

The Witness: That is as far as a radiosonde unit is concerned.

The Court: Well, I think the question was what he did in general for the company, so anything you saw him do.

The Witness: Most of his time was up there on the radiosonde unit.

The Court: You didn't see him do anything else?

The Witness: He prepared samples which I selected for test. He also ran a shock test which I had selected samples for. He prepared the various samples for the test, such as the calibration and the operational test, and he checked the calibration station for the units.

Q. How did he prepare the units for the calibration tests?

A. After I had selected my samples from the lot, George Faria would sometimes put a clip or solder a wire across the relay, and then he would insert a radiosonde unit which had been selected for the pressure test into the test box, and then would proceed to set up the equipment to run the test.

Q. Now, what other personnel operated the calibration test?

[fol. 154] Mr. Angoff: If your Honor please, before we go on to any other person, so far as the defendants Fong Foo and Robert Knupp, I would suggest this testimony be stricken out, because they haven't been tied up in any way.

The Court: The motion is denied. I have no idea whether it is anything more than background testimony at the moment. It sounds like that, and it is admissible.

Q. Now, will you tell us what other personnel operated the calibration test?

A. Mr. Jim Pembleton and Viola—

Q. What did you see him do?

A. Pembleton performed the operational test on the radiosonde unit. He also assisted George Faria in preparing these units. He subjected the units to a vibration test which I specified on the sample units. He prepared the units, obtained the serial numbers of the units, and performed the humidity, relative humidity test, prepared—

Q. Is that a calibration test?

A. Yes, that is a calibration test. Prepared those samples, and may have run several shock tests on radiosonde units.

Mr. Angoff: I object to anything with the word "may" in it. Either he did or didn't.

The Court: What do you mean by may?

The Witness: Well, he subjected several lots of the units to a shock test.

[fol. 155] The Court: In other words, what you mean is he did it occasionally, but not uniformly?

The Witness: Yes.

The Court: The testimony may stand.

Q. And what other personnel of Standard Coil were involved in the calibration test?

A. Viola Mullen, later Viola Faria.

Q. What did she do?

A. She performed the temperature test on the samples that I had selected from the lot.

Q. What other personnel were involved in the calibration test?

A. In the government calibration?

Q. All right.

A. During the course of inspection of my samples there may have been other individuals, which did not take too active a part in it, maybe one lot or two lots, and Mr. Jones—

Q. What is his first name?

A. Allen Jones performed the shock test on my units. He also performed the operational test and prepared units for the test.

Mr. Sawyer at the very beginning of the contract, in September and October, 1956, did prepare and submit some of these units to the calibration test.

Q. So is it your testimony that it was primarily George and Viola Faria and Jim Pembleton who performed the calibration test?
[fol. 155 A-1] A. Yes.

Mr. Angoff: I object.
Mr. St. Clair: I object.
The Court: What is the objection?
Mr. St. Clair: Read the question, please.
The Court: It was merely a statement of what he testified a moment before. The answer may stand as unobjectionable.

Q. Did you have anything to do with these tests?
A. Yes.
Q. What?
A. I selected the samples to be tested. And in October 1956 I observed the testing of these units for the calibration test.
Q. Was there any customary number of samples which you would select?
A. Yes.
Q. What was the number?
A. Based on the lot size of 200, I selected five samples for the pressure test, five samples for the temperature test, and five samples for the humidity test.
Q. Now, did you observe how the calibration tests were run?
A. Yes.
Q. With respect to the temperature calibration test, will you tell us what you observed as to how the temperature test was run?
[fol. 155 A-2] A. Viola Faria would have the unit already prepared by having a relay jumper put across the relay.

The Court: What is a jumper?
The Witness: A jumper, or a clip; that is to short off the relay. And she would place these units in the temperature box.

Q. Use the chart and the blackboard, if you will, pointing out the places at which she performed these operations.

A. (complying) In Table B, on the upper end of the fourth chamber over is where the units were prepared, where the operator placed a jumper across the relay. Then the units were taken to this chamber here—

The Court: What is here?

The Witness: Which is the temperature control stations.

The Court: For the sake of the Court of Appeals, which I have already told you is blind, you have to have the description more accurate. It is in the second row, the second unit over, right?

The Witness: Yes. The operator, Viola Faria, sat at this position—

The Court: Well, what is this position, please?

The Witness: At the temperature control station.

The Court: And that is also in the same block, in the second row, the second unit over?

[fol. 155 A-3] The Witness: Yes, sir. She also, before assuming this position, placed the units under test in the temperature test chamber.

The Court: Which is in the top row, the third unit over?

The Witness: Yes.

The Court: Please, will you state just where it is, because remember, the Court of Appeals will not have before it you standing at a chart to which you are pointing, and they have to look at a cold record and it is very difficult.

Q. That position is also numbered 11, is it not?

A. Yes, sir.

Q. State the numbers of the positions, where they are indicated.

A. Yes, sir. After she had placed the units, the five samples, in the chamber at Position 11, then she would take her seat at the temperature control station, which is the second row, the third block in, then she would proceed with the inspection and obtain the various readings.

The first operation, she would bring the chamber down to approximately 50 degrees.

Q. Plus 50, or minus?

A. Minus 50 degrees Centigrade, and would obtain her first reading there.

Q. What do you mean by obtain her first reading there? [fol. 155 A-4] A. At the position where she was sitting, which is the second row, the second block over, there is a notation "Single Head Recorder." At the minus 50 degree Centigrade level, when the chamber had reached the stabilization period, she would turn on a switch, which turned a recorder on which would mark dots and dashes on a tape. So she took the dots and dashes that these units were reading on the tape for the sample units. She then proceeded by the use of buttons—

Q. Excuse me. Did she put any notations on the tape herself?

A. Yes, sir, the tape showed a unit number—

The Court: Well, the tape doesn't show; the question is, what did she put on the tape?

The Witness: She put serial numbers of units and the temperature which had been registered.

Q. And in the case you stated, minus 50 degrees Centigrade. Then what did she do after that?

A. Then she took this information from the tape and put it on a work sheet which contained the serial number of the unit and the temperature that she had read, the lot number, and the code she had interpreted from the dots and dashes on the tape.

The Court: What do you mean by that?

The Witness: When she read the dots and dashes, she established what the code letters were for those dots and dashes.

The Court: So she wrote down letters indicating the [fol. 155 A-5] figures as they appeared to her to have been written on the tape?

The Witness: Yes, sir. After this had been done she varied the temperature in the chamber down to minus 30 degrees Centigrade, and repeated the same process. This process was also repeated at minus 10 degrees Centigrade, at plus 10 degrees Centigrade, and at 30 degrees Centigrade.

Q. Now, what besides the tapes, what other papers were produced by Mrs. Faria in the course of the temperature test?

A. She had her work sheets, on which she put down the readings of the units.

Q. What was the name of those work sheets?

A. The name of the work sheet was temperature performance test data.

Mr. Angoff: May we have these produced in court?

Mr. Caner: They are in court, and they will be available to the defense at all times.

Q. Do you know what was done with the tapes and the test data?

A. Yes. If I was in the immediate vicinity, Viola Faria would turn the tapes and the test data over to me. And if I was not in the vicinity, she would turn the tapes and test data over to Mr. Sawyer or Mr. Jones, or to other individuals of the Quality Control Section of Standard Coil Products.

Q. And do you know what was thereafter done with them?

A. Yes, the tapes that I didn't pick up were in turn [fol. 155 A-6] transmitted to my office by either Mr. Sawyer or Mr. Pembleton or Mr. Jones or other individuals.

Mr. Angoff: May we have the tapes produced in court?

Mr. Caner: Yes, the tapes will be available to the defense at all times.

Q. I show you a tape and ask you if you can identify it?

A. Yes, this tape is used in the temperature calibration procedure.

Q. Does it have any markings on it?

A. Yes.

The Court: That may be marked for identification at this stage, No. 11 for Identification, sample tape.

Mr. Angoff: It happens to be marked, your Honor.

The Court: Well, so far it is not admitted.

(Sample tape marked Exhibit 11 for Identification.)

Q. Is this tape representative of the tapes that were produced in the course of the temperature test?

A. Yes.

Mr. Caner: I offer it.

The Court: Now, is the marking really prejudicial?

Mr. Angoff: I have no particular objection to the sample tape. I don't know what it is for.

The Court: This is merely a sample, and it is admitted as Exhibit 11 as a sample, and the Jury is to realize that [fol. 155 A-7] any marks on it are merely illustrative and have no probative value, beyond the fact that they are samples.

(Exhibit 11 for Identification received in evidence.)

Q. Now, did you observe the operation of the pressure test?

A. Yes.

Q. Will you tell us what you observed?

A. Going back to the chart, after I had selected my samples and they had been prepared by putting a jumper or clip across the relay, Mr. Faria and Mr. Pembleton proceeded to place the units in the chamber, No. 12, which is in the top row marked "Ambient and Cold Pressure Chamber."

After the units had been placed in the chamber, the cover was brought down and the chamber was sealed. Then Mr. Faria proceeded to operate the controls.

In the meantime, Mr. Pembleton sat at the position just to the right of No. 12, and Mr. Pembleton recorded on a work sheet the chassis numbers of the units and the position in which they were placed in the pressure chamber.

Mr. Faria proceeded to operate his controls at the position which is marked "Pressure Control," at the right of Position 12 in the first row; he brought this chamber down by varying the controls and evacuating the air in the chamber to approximately 150 millibar pressure level.

Then he read—he pressed a button and a tape moved [fol. 155 A-8] along under a set of marking instruments, and when he had reached his level, his prescribed level, he turned on a switch which marked on the tape dots and dashes.

This tape then was taken by Jim Pembleton and he marked the pressure level which Mr. Faria had pressed the buttons at, and Jim Pembleton interpreted the dots and dashes and placed the code letters for those dots and dashes on the tape.

Q. Did he place any other markings on the tape?

A. At times he placed the serial numbers of the units, and at times he placed the levels of the readings which the units were read at, such as 145 millibars, 146 to 155.

And he also marked in the code letter at the point where the first translation of a particular code took place.

This same operation took place at the 250 level, at the 350 level, at the 450 level, at the 550 level, at the 650 level, at the 750 level, at the 850 level, at the 950 level, at the 990 level, and the 1030 level, which is ten readings that Faria and Mr. Pembleton recorded data on.

Q. Did the machinery record readings of the samples selected separately?

A. The unit recorded the dots and dashes for each unit that was in the chamber on that one tape, so you had five different readings.

Q. With respect to the temperature test, were the units [fol. 155 A-9] recorded separately or in a group?

A. They were recorded separately.

Q. So the pressure test is different in this respect?

A. Yes.

Q. Did you always test five samples for pressure?

A. For approximately three or four months, during October and through November and December 1956, there was five samples. Then we subjected seven samples to the test for pressure.

Q. Why did you make the change?

A. Well, that was based on the amount of samples we had taken, and the amount of defects we had encountered, and based on the AQL for that particular test—

The Court: What?

The Witness: Acceptable quality level for that particular test.

Q. Now I show you a paper and ask you if you can identify it?

A. Yes, this is a recording of the dots and dashes obtained from the pressure calibration test at the 990 level.

Q. And is that representative of the pressure tapes that were produced in the course of the pressure test?

A. Yes.

The Court: It may be marked for identification Exhibit 12.

Mr. Angoff: With the same modification, if there are any marks on it they won't be used?

[fol. 155 A-10] The Court: It is offered solely as a sample, and for that purpose it is admitted as Exhibit 12, it being understood that the only evidentiary purpose for which Exhibit 12 is being offered and received is as a sample. If there is any special significance in the particular markings on that sample, the Jury will disregard the special significance and regard the tape or recording only for its general sample value.

Mr. Angoff: Mr. Caner, is that marked in any way?

Mr. Caner: It has on it the dots and dashes of the millibar points—

Mr. Angoff: All right, that is all I wanted.

(Sample tape marked Exhibit 12.)

Q. Now, what did you observe with respect to the operation of the humidity test?

A. On the humidity test I had selected five samples, and the five samples of radiosonde—that is, minus the parachute—had been placed in Chamber E, which is the fifth chamber in the first row at the top, called "Humidity Conditioning Chamber."

These five units had to remain in this chamber for not less than six hours, where they were conditioned to moisture which had been introduced into the chamber by various controls associated with the chamber. After six hours, Mr. Pembleton or Mr. Rosenholm at times—

The Court: That is the first time you referred to him. [fol. 155 A-11] What did you see him do in general around the plant? What occupation did you see him perform?

The Witness: He ran the operational test on these units, he worked at the various other manufacturing positions,

he worked as a quality control man in the beginning, then he went into the production of radiosonde units. And then he was a supervisor over the calibration position for the radiosonde units.

Mr. Faria and Mr. Rosenholm would take these five units and place them in position 13, called the "Humidity Chamber," at the right-hand top corner, the second chamber in, they would place these units in the chamber and bring the cover down. And they would mark on a work sheet the serial number of the units and the levels at which they were tested.

And the third chamber at the right of the chart shows the humidity control for Chamber 13, and also a notation "Multiple Head Recorder," which is an instrument for recording the dots and dashes given off by the units.

After the chamber had been brought to its proper humidity by Mr. Faria and Mr. Rosenholm, then they turn on a switch and obtain dots and dashes for the units being tested at the level on which they were being tested. The levels were approximately 50 per cent, 90 per cent, 50 per cent, 25 per cent, and 50 per cent.

Q. You mean they would take readings at 50 per cent [fol. 155 A-12] relative humidity twice?

A. Three times, sir.

Q. For what purpose?

A. That is to ascertain whether the humidity elements were stabilized, that they would repeat their readings.

The Court: I don't quite understand. Does that mean that the humidity testing is perhaps a little less reliable than temperature testing, and has to be checked?

The Witness: No, sir.

The Court: Why do you have three readings?

The Witness: Well, that is to see that the elements recovered from going to 50 per cent, to 90 per cent--

The Court: To see whether it is still virgin air?

The Witness: I grant you that.

Q. What did he do thereafter?

A. Then after he had recordings on the work sheet and the readings obtained, and the levels, and noted on the

tapes the levels which he had read at, then he turned the data over to me if I was in the area, or to other quality insurance representatives, or it was channeled through the quality control section to my office.

Q. Now, I show you a paper and ask if you can identify it?

A. Yes.

Q. What is it?

A. That is the humidity test, dots and dashes for the [fol. 155 A-13] humidity on the 50 per cent level.

Q. How many units are covered by that tape?

A. That one tape covers one unit only.

Q. I show you another—

The Court: Now, just a moment. The first one, Exhibit 13 for Identification, is there any objection to that being introduced as a sample, it being understood that the particular readings have no evidentiary significance except as illustrative of the general type of reading?

Mr. Angoff: Your Honor, I have one objection at least. At no time during this testimony in regards to this test have there been any dates introduced. There are two contracts involved.

The Court: When were these humidity tests?

The Witness: They took place on both contracts through the period of September 1956 through to about March 1958.

The Court: Now, is there a further objection?

Mr. St. Clair: You asked if there was any objection, and I record none.

The Court: Exhibit 13 is admitted.

(Sample tape marked Exhibit 13.)

The Court: Now, you were going to ask about another tape?

The Witness: This tape is also the result—the dots and [fol. 155 A-14] dashes of six units on the humidity test.

The Court: That is offered likewise merely as a sample, and is admitted only as a sample under the same general ruling I have previously indicated.

Mr. Angoff: No objection.

(Sample tape marked Exhibit 14.)

Q. Did you sometimes test six samples for humidity?

A. No. Later on we did test seven samples, on which we could only record six on the tape, and the seventh sample would be recorded separately.

Q. Now, did you have any conversations with anyone in the plant about the submission of radiosondes for testing?

The Court: The answer is Yes or No, and nothing else.

The Witness: Yes.

Q. When did you have the first conversation?

The Court: No. With whom?

Q. With whom did you have the first conversation?

A. With Fong Foo.

Q. When?

A. In the last week of September, or the first or second week of October, 1956.

Q. Where?

A. At the Standard Coil Products, Incorporated plant.

Q. What did you say to him and what did he say to you, in that conversation?

[fol. 155 A-15] Mr. St. Clair: I object on behalf of Standard Coil.

The Court: Not knowing what the conversation relates to, I am inclined at this moment not to admit the conversation against the corporate defendant. I do not know whether it is going to cover a matter which is within his authority to speak or not, and therefore at the moment I will admit the conversation only against Fong Foo as an individual.

Mr. Angoff: I made no objection, your Honor.

The Court: I know that, but Mr. St. Clair objected on behalf of the corporation. There being no objection to its being admitted against Mr. Robert Knupp, it is admitted against Mr. Robert Knupp.

Mr. Angoff: Well, your Honor—

The Court: You just said you made none.

Mr. Angoff: I made no objection as to Fong Foo. I

will have to be more alert; thank you. As to Robert Knupp, of course, I object.

The Court: All right, at this stage it is admissible only against the defendant Fong Foo.

Mr. Angoff: Thank you.

Q. What was the conversation?

A. The conversation was relative to the—

Mr. St. Clair: No, please.

The Court: Tell us as nearly as you can the words used. Everybody knows perfectly well that unless you had a [fol. 155 A-16] recording machine you don't know exactly what you said four years ago, but tell me as close as you can come.

The Witness: I had told Fong Foo that the material being submitted to the quality insurance representative—

The Court: Meaning you?

The Witness: Meaning me.

The Court: Don't use all these involved ways of talking about simple things.

The Witness: That the material he was presenting to me for government acceptance would have to be submitted on a form, and this he agreed to, and this became the—

The Court: Well, now, wait a minute. Is that the whole of the conversation as far as you remember it?

The Witness: As far as I remember at that stage, yes.

Mr. St. Clair: I withdraw my objection.

The Court: All right.

Mr. Angoff: I only want to identify the form, because somewhere along the line these numbers are going to mix us up.

The Court: You have no objection to the conversation being admitted against Mr. Knupp now, have you?

Mr. Angoff: On this, no, your Honor.

The Court: And the testimony at this stage is admissible against the corporate defendant and both individual de- [fol. 155 A-17] fendants. But we are a little uncertain as to what kind of form you were talking about, if you were talking about any particular one.

My notes would indicate your present testimony is that you talked to Mr. Fong Foo about the material submitted

to you on a paper form. Did you show him a form, or indicate the form he was to use?

The Witness: Yes, I told him the form should contain—

The Court: Did you show him a sample form?

The Witness: No, sir, not at that time.

The Court: What did you tell him the form should contain?

The Witness: The form should contain the lot number of the units, the date, the contract number, what the units were being submitted to me for, what type of test, and the description of the unit, such as the radiosonde.

Q. Did you have any other conversation after that?

Mr. Angoff: Well, can we identify the form?

The Court: Well, at the moment how can you identify something which is not in existence except by description?

Mr. Angoff: He said not at that time.

The Court: It is properly within the scope of direct examination to proceed in such a way as the government chose. The government has proceeded by way of a conference at which there was merely directions given by Mr. [fol. 155 A-18] Palliotto to Mr. Fong Foo of what kind of documents he would want, none being actually drawn up; is that correct?

The Witness: That is right, sir.

Q. Now, when were the first radiosondes submitted to you for calibration inspection?

A. In October 1956. The exact date, I would have to check the form.

Q. Will you do that, please, and obtain the form?

A. (Complying) On the 11th of October, 1956.

Q. Now, were any papers submitted to you at that time?

A. No, just this lot transmittal sheet.

The Court: That is a paper, presumably, isn't it?

The Witness: Yes.

Mr. Angoff: Now, may the record show what you used? It shows a submission by Sawyer, not by Fong Foo.

Mr. Caner: The document will be introduced.

Mr. Angoff: Now, can we have an election by the gov-

ernment as to whether or not they are going to introduce all the documents, or none?

The Court: They are not required to elect until they choose to make an election, with all its perils.

Q. Will you take that document out of the file?

(The witness complied.)

The Court: To me it isn't quite clear whether it is your testimony that Sawyer personally gave you this or whether [fol. 155 A-19] Mr. Fong Foo gave you this on the 11th of October 1956. Which is your testimony?

The Witness: I couldn't at the present time tell who personally handed it to me.

The Court: You just know you got it, and you don't know who gave it to you?

The Witness: Yes.

The Court: Can you by diligent reflection recall the person who gave it to you? It might turn out to be of some importance.

The Witness: At this point, I couldn't exactly say, sir, who actually gave me this sheet.

Q. Does the sheet relate to any particular lot?

A. Yes.

Q. Which lot?

A. Lot 1.

Q. At the time it was submitted to you, what writing did it have on it?

Mr. Angoff: Doesn't the sheet speak for itself, your Honor?

The Court: It does, unless it has been altered.

Mr. Caner: Withdrawn.

The Court: Is it your concession that it was in that form at the time it was submitted? Because otherwise the question is appropriate.

[fol. 155 A-20] Mr. Angoff: I assume it was in that form at the time of submission.

Mr. Caner: I am going to inquire.

Q. Was all the writing which now appears on that sheet on it when it was first submitted to you?

A. No, sir.

Q. What writing was on it when it was first submitted to you?

A. The lot number.

The Court: Before we go any further than that, will you mark Exhibit 15 for Identification? And may I just call it to your attention that if something is not marked for identification at the moment it is referred to, no appellate court will know what you are talking about, and will be required diligently to examine a lot of exhibits, some of which may not have been actually admitted but only identified, in order to know what the transcript means.

(Submittal sheet marked Exhibit 15 for Identification.)

Q. Now, referring to Exhibit 15 for Identification, will you tell us what writing was on the form when it was submitted to you?

A. The lot number, the Standard Coil Products, Incorporated number for the radiosonde, job number, the date of—

The Court: Is that something different from the lot number?

[fol. 155 A-21] The Witness: Yes.

The Court: All right.

The Witness: The date of submission, the nomenclature of the material—

The Court: That is a fancy name. What do you mean, that it says radiosonde?

The Witness: That is right.

Q. It says AN AMT-3F, and the heading next to that is "Nomenclature of Material"?

A. Yes.

Q. What else is on the form?

A. The item number, the quantity in the lot, and the description, AN AMT-3F, and the contract number.

The Court: The contract number is something different from the lot number, is it?

The Witness: Yes.

The Court: And it is different from the job number, too?

The Witness: Yes. And the test that was required, such as on this sheet the electrical and the shock test.

Q. Was electric another name for the calibration test?

A. Yes.

The Court: That can't be a correct description, can it? The electric test is a shorthand way of saying temperature, humidity and pressure test, isn't it?

[fol. 155 A-22] The Witness: Yes, at this time it was.

The Court: There is no such thing as a calibration test, is there, after this stage of the proceeding?

The Witness: Yes.

The Court: Is there?

The Witness: No.

The Court: Calibration test refers to something way back, which you described on Friday?

The Witness: Yes, sir.

Q. The process of calibration is to—

A. Well, to establish that the calibration has been—the government tests were to establish that the units had been properly calibrated.

The Court: All right, properly calibrated with respect to a particular subject?

The Witness: Yes, sir.

The Court: Calibration is a loose word for the establishment of a relationship between one scale and another, is it not?

The Witness: Yes, sir.

Q. Was there any other writing on the form when it was submitted to you that you haven't covered?

A. Yes, there was the signature of Allen R. Sawyer.

Q. Now, is it fair to say that with respect to this document before you, the writing that was on it when it was [fol. A-23] submitted to you was the writing that appears in ink, as distinguished from the writing which appears in pencil?

A. Yes, sir.

Mr. Caner: I offer it.

The Court: Wait a minute. You certainly don't offer the penciled parts, do you?

Q. Who put the pencil marks on that sheet?

A. The pencil marks are my notations of my observation of the lot.

Mr. Angoff: Signed by you? Right?

Mr. Caner: I am doing the questioning.

Mr. Angoff: I know, but he put the pencil marks on—

The Court: Mr. Caner has no right to resent this because unfortunately it was presented in a way which led to an objection. Were the pencil marks here made by you?

The Witness: Yes.

Mr. Angoff: And his signature is in pencil.

The Court: That part of the exhibit isn't offered, I suppose.

Mr. Caner: I have no objection to its being offered.

The Court: But somebody else has an objection.

Mr. Caner: Well, if he does, I offer it. Do you object? I offer the entire paper.

The Court: Including the pencil notations?

Mr. Caner: Yes.

[fol. 155 A-24] The Court: I don't know whether they have any relation at this stage of the testimony. This exhibit is being offered, as I understand it, as the first sample of what was submitted by the corporation, or one of its representatives on its behalf, to the inspector acting for the government; isn't that right?

Mr. Caner: This document is offered as corroboration of the fact that the first lot was submitted for a temperature, pressure and humidity test, as well as a sample.

The Court: Exhibit 15 is admitted in so far as it includes the ink writing, and everything on that exhibit which is in pencil the Jury is instructed to disregard; it is not part of the testimony.

(Exhibit 15 for Identification received in evidence.)

Q. Now, with respect to Lot 1, were there any papers which were thereafter submitted to you relating to the temperature, pressure and humidity test?

A. Yes, the test data, tapes, and the work sheet for that lot, showing the results of the tests that had been obtained.

Q. Now, can you secure the—first of all, do you have the tape involved?

A. No, sir.

The Court: You do not have it? Does that mean that it is lost, or you do not have it here?

[fol. 155 A 25] The Witness: I do not have the tape because—

The Court: Have you made a search and you haven't got it, or you have it but it isn't here?

The Witness: I do not have it, sir. I have made a search.

Q. Do you have the test data sheets?

A. Yes.

Q. Will you secure them?

(Witness complies.)

Q. Now, you have taken out some papers. Will you identify what those papers are?

A. The first sheet contains the results obtained by Mr. Sawyer, I believe, at this time, and the initials, someone's initials; I can't establish—

The Court: That may be marked for identification Exhibit 16. Please don't make me every time tell you that you can't refer to a piece of paper without having it identified.

(Test data sheet marked Exhibit 16 for Identification.)

Q. Now, with respect to Government's Exhibit 16 for Identification, what are the numbers on that paper?

A. The numbers—

Mr. Angoff: I object.

The Court: He can describe them in general.

The Witness: This represents in Lot 1—

[fol. 155 A-26] The Court: That is what you are not to tell us. It shows the lot number?

The Witness: It shows the lot number, the frame number.

The Court: What does the frame mean?

The Witness: That is the serial number appearing on the frame of the unit.

The Court: Like on an automobile, the engine number?

The Witness: Yes. A column which has Amb.

The Court: What do those letters mean?

The Witness: That is Ambient.

The Court: Will you define that?

The Witness: That is the conditions existing at this particular—

The Court: It means the surrounding circumstances?

The Witness: Yes.

Mr. St. Clair: Room temperature, your Honor.

The Court: Not necessarily.

Mr. St. Clair: I am sorry.

The Court: Ambient just means those conditions surrounding at the time of the experiment, or at the time of the report.

The Witness: Yes, sir. And underneath the abbreviation Amb. is another abbreviation, or an error here, actually.

[fol. 155 A-27] The Court: I can't hear you.

The Witness: There is a word "Color"; actually it is supposed to be Cold. It is a typographical error.

The Court: How is it spelled there?

The Witness: C-o-l-o-r.

The Court: What is wrong about that?

The Witness: The word is supposed to be Cold, C-o-l-d.

Q. Now, digressing a minute, on the pressure test were more than one test performed?

A. Yes.

Q. What were the tests that were performed?

The Court: Now, just a moment. Did you perform more than one test?

The Witness: Yes, I witnessed—

The Court: Are you telling us now about tests you performed, or are you telling now about tests someone else performed?

The Witness: No, the personnel of Standard Coil Products.

The Court: Then the question is, did you receive a report of more than one test?

The Witness: Yes.

Q. And what test did you receive reports on?

The Court: No. What reports did you receive?

[fol. 155 A-28] Q. Did you observe the operation of two tests?

A. Yes.

The Court: Thank you for putting into the question what hasn't yet come in the answer. That is really objectionable. Number two wasn't in the testimony at all; I didn't know it until it was in your question.

Q. Did you observe the operation of more than one test with respect to pressure?

A. Yes.

Q. How many tests did you observe?

A. Two.

Q. What was the first test that you observed?

A. The first test that I observed was the subjecting of these radiosonde units to the pressure tests at the various levels at the ambient temperature condition, the room temperature condition existing in the chamber at that time.

The second test was at a cold temperature, and the readings were obtained at the same points which they had obtained on the regular room temperature run.

Q. Any particular cold temperature?

A. Yes.

Q. What?

A. Approximately 65 to 70 degrees, minus 65 to 70 degrees, below the point of the room temperature existing at the original test.

[fol. 155 A-29] Q. So do I understand that if the room temperature was 30 degrees Centigrade, the tests would be run between minus 30 Centigrade and minus 45 Centigrade?

A. Yes.

Mr. Angoff: I am not objecting to the main question he is trying to ask, but I am not interested in what he is trying to understand.

The Court: He is merely restating what is in the prior

answer, and is making it a little clearer, because I think this witness hasn't as much command of the English language as Mr. Caner.

Q. Is that a correct summary of an example?

A. Yes.

Q. Now, what was the purpose of having first an ambient run, and then a cold run?

A. That was to compare the difference between the two runs.

The Court: What did you call them?

The Witness: The two runs.

The Court: Why do you call it a run? It is just a test, isn't it?

The Witness: Well, a test, yes.

The Court: There is nothing about the difference in the sense of running; it is just a test, isn't it, the difference between the two tests?

The Witness: Yes.

[fol. 155 A-30] Q. What was the reason for the two tests?

A. To see if the pressure results would stay within a certain range; in other words, a check to see if the pressure results would be stable on both room conditioning and cold conditioning.

Q. Now, are there any other papers in this group of papers before you which were submitted to you?

The Court: Now, the papers before you are Exhibit 16 for identification, are they?

Mr. Caner: That is the first paper.

The Court: Well, if he has any other papers, I told him he couldn't refer to them without having them identified.

Mr. Caner: I just want to know if there are others, then I will ask to have the first one marked.

The Court: All right.

Q. Were there any others?

A. Yes.

Mr. Caner: Will you mark this for identification? It is entitled "Radiosonde Humidity Performance Test."

The Court: That is Exhibit 17 for Identification.

(Document entitled "Radiosonde Humidity Performance Test" marked Exhibit 17 for Identification.)

Mr. Angoff: Your Honor, I am in a difficult situation. In the very beginning, I don't think the government claims [fol. 155 A-31] that any particular test data sheet or any subsidiary document is in and of itself false, and I don't know whether I should object each time and say, "Is this paper false or not?"

The Court: I think you can bring that out on cross-examination, if it be relevant. But you won't make a valid objection if you object on the ground—

Mr. Angoff: Might we at least know at this stage, does he claim that any particular tape, data sheet, subsidiary document, submission sheet, is in and of itself false? If he doesn't, I won't object.

Mr. Caner: I will be happy to answer your question. The government claims and will show that the entire test procedures—

Mr. Angoff: I just wanted—

The Court: You invited it.

Mr. Angoff: All right, we might as well get it.

Mr. St. Clair: I made no such invitation, but I will listen.

Mr. Angoff: I would like to have the answer to my question, though.

The Court: If you will all keep quiet, Mr. Caner will make a speech.

Mr. Caner: The government alleges and will prove that the test procedures as operated by these test operators whose names you have heard were false, that they were [fol. 155 A-32] instructed to operate the procedures falsely, that as a consequence of the falsification of the test procedures many of the test data sheets, many of the tapes, and all the subsidiary documents flowing from the false testing procedures, were in themselves false.

The government will not prove that any particular test data sheet or any particular tape is false, but the government will prove that all these test results which were submitted to the government inspector were permeated by a fraud, were permeated by a false procedure, which couldn't

help but necessarily produce false test results, and that the government inspector received these results thinking that they were honest results, but they were not, and that the dishonesty was concealed from him.

The Court: If this were delivered to the Jury instead of to the Court, it would be proper to have a mistrial, but I won't declare a mistrial because I assume it is inadvertence, and I also point out that your response was far too extravagant to the question put to you, plainly unseemly, but I would write it down to inadvertence.

You were asked a very simple question. The very simple question is whether you assert that the tapes incorrectly transcribe the information which was available from the test. The test may be improperly conducted, but the only question you were asked, and which you should have [fol. 155 A-33] replied to directly, was whether you claim that the tapes are a false reading of the instruments as they were then operated. Were they or weren't they?

Mr. Caner: The government answers that many of the tapes were false, but it is not possible to show which particular tapes were false at this time.

The Court: That is all that was called for.

Mr. St. Clair: I assume that the Jury will be instructed to entirely disregard anything except this last remark Mr. Caner made.

The Court: Most certainly.

Q. Now, what does Government's Exhibit 17 for Identification show in general?

A. The serial numbers of the units which I had selected for test, the various humidity levels they have been checked at, the code reading obtained at these various levels, and the difference between the actual reading obtained on the unit and the actual reading shown on the charts for the unit, and it has the signature of Mr. Allen R. Sawyer, and several initials which I cannot interpret at this time, and the lot number and the date.

Q. Which lot?

A. That is Lot 1.

Q. And the date?

A. 10/10/56.

[fol. 155 A-34] Mr. St. Clair: That is not September.

The Court: No.

The Witness: I didn't say September, sir.

The Court: It was difficult to understand just what he said.

Mr. St. Clair: I am sorry.

Q. Were all the writings now appearing on that paper on there when the paper was submitted to you?

A. No.

Q. What writings were on the paper when it was submitted to you?

A. The number of the unit, the humidity level which they tested, and the code obtained at that level, and the—

The Court: Excuse me. The what obtained at that level?

The Witness: The code group.

The Court: Will you define that a little more accurately? Does it show letters?

The Witness: It showed letters, yes. And the signature—the initials of the person and the signature of the person running this—completing the test, and the lot number and the date.

Q. And the other markings were not upon that paper when it was submitted to you?

A. No, sir.

[fol. 155 A-35] Mr. St. Clair: If your Honor please, I think this word "submitted" may run into a little trouble. Maybe we ought to have it just "gave".

The Court: In any event it is objectionable not only for that reason, but because it doesn't say who gave it.

I have already pointed out to you the very grave risk, when an individual is upon trial, of something being attributed to that individual merely by either a passive or vague verb, which does not relate to a particular individual engaged in particular conduct.

It may be that the defendant himself acts, it may be that somebody acts, and the witness knew they acted, and in that event the relationship between the actor and the act can be established.

But for the protection of every man's liberty, that man is entitled to have identified particular individuals with whose action he is charged.

Q. Who signed this paper?
A. A. R. Sawyer.
Q. Do you know who gave it to you?
A. No, at this time I couldn't say who exactly gave me this sheet.

The Court: Are you prepared to say that it was either Sawyer or somebody else?
The Witness: Yes, sir.
[fol. 155 A-36] The Court: You can give us that answer?
The Witness: It was either Sawyer or someone else.
The Court: Oh, no. Could you name that other person?
The Witness: It could be a variety—
The Court: I am to blame, not you. Have you a sufficiently distinct recollection to be able to see in your mind two or three specific persons, one of whom was the giver?
The Witness: No, at this particular time I couldn't.
The Court: Then don't try to imagine or invent.
Mr. Caner: Well, the government offers it, if the Court please.
The Court: For what purpose?
Mr. Caner: To show that this was the paper which was given to Mr. Palliotto, as first of all a sample of such papers, and secondly as corroboration that particular lot was submitted to him for the humidity test.
Mr. Angoff: May I ask whether or not there is any claim of falsity in this particular paper?
The Court: There is no need of making a voluntary statement with respect to it, and I am first going to rule upon the offer. I am going to rule that Exhibit 17 for Identification is admissible in exidence, not merely as a sample, but as something which was actually received by the witness on the stand.

But I am also going to instruct the Jury that there is [fol. 155 A-37] no evidence as to which particular individual gave that document, and at this stage there is nothing to show that either of the individual defendants was concerned with the presentation of the document. The rul-

ing I make with respect to Exhibit 17 for Identification, I make it parallel with the special Exhibit 16 for Identification and make the admission upon the same basis.

(Exhibits 16 and 17 for Identification received in evidence.)

The Court: And I do not suggest that it is at all the duty of the government to respond, but if the government cares to respond it may do so, to the inquiry.

Mr. Caner: This document—

The Court: Do you make the claim it is in any respect false? Yes or No. And you don't even have to answer it at all.

Mr. Caner: The question cannot be answered Yes or No.

The Court: Then it isn't the answer.

Mr. St. Clair: If your Honor please, in view of that statement and in view of the prior answer given by Mr. Caner, I would not object to its being simply a sample, but I object to its having any further significance beyond that.

The Court: It has the further significance that the witness received it from an employee of the company, unidenti-
[fol. 155 A-38] fied, and what value it has on the substantive aspects of this case I do not now see. I am not sure whether at a later stage this will be so tied up with any particular individual as to justify any verdict at all with respect to that individual.

Mr. St. Clair: There are other people, other employees of the defendant, from whom he may have received it, and there is no evidence that it didn't come from Mr. Brown, his assistant.

The Court: I think that is a good point, and as of this time I restrict Exhibits 16 and 17 to sample use. In no regard is either the corporation or either of the individuals to be deemed to have directly or through an authorized person given the document to the witness.

Mr. Caner: May the government inquire of the witness whether it was submitted to him by an employee of the corporation?

The Court: Surely.

Q. Was this paper submitted to you by an employee of the corporation?

The Court: Previously he couldn't remember who the person was. I am allowing his memory to be refreshed, if it is refreshed. But remember, just a moment ago you didn't know who it was that gave it to you.

The Witness: No, I still have to say I don't know exactly who gave it to me.

[fol. 155 A-39] Q. Do you remember whether it was an employee of Standard Coil?

The Court: Now, you can't continue with your own witness beyond the point I allowed you to go.

Mr. Caner: Withdrawn.

Q. Were any other papers given to you in connection with Lot 1?

The Court: Will you please not use that form of question? You can ask about individuals who gave him papers, but "were given" leaves it all up in the air as to what his source is.

We already have an objection pointing out that there were assistants of the government who were around and who might have been the givers. And therefore, if you want to ask any questions with reference to the source of the document, you will have to point more precisely.

Q. Did you have any other papers given to you with respect to the tests on Lot 1?

A. Yes.

Q. What other papers have you?

A. The radiosonde temperature performance test data.

The Court: Is that paper here?

Mr. Caner: Yes, and I offer it for identification.

The Court: Exhibit 18 for Identification.

(Radiosonde Temperature Performance Test Data sheet marked Exhibit 18 for Identification.)

[fol. 155 A-40] Mr. Angoff: What do you call it?

The Witness: Temperature Performance Test Data sheet.

The Court: Radiosonde Temperature Performance Test Data sheet, you now call it?

The Witness: Yes.

Q. By the way, at this time were there any other government inspectors at the plant besides yourself?

A. No, sir.

Q. Now, what marks that are now on that paper were there when it was first given to you?

The Court: When you first received it.

Q. When you first received it?

A. The name Viola Mullen, the date 10/10/56, the signature of A. R. Sawyer, the serial numbers of the units, the code letters for the various temperature levels.

Q. And the other markings on the paper were put there by whom?

A. By myself.

Mr. Caner: Offered as a sample, and also as evidence of the fact that it was given to him.

The Court: You mean evidence that he received it. If you wouldn't use the passive you would recognize the error of your ways, because you would then recognize that the testimony shows only that he received it. Your use of the passive is in danger of concealing from the Jury the absence [fol. 155 A-41] of proof. It is admitted as a sample, and not beyond that, as Exhibit 18.

(Exhibit 18 for Identification received in evidence.)

The Court: The Court will take a 15-minute recess.

(Short recess.)

Q. Now, Mr. Witness, there are in evidence as samples Government's Exhibits 16, 17, and 18, being three test data sheets relating to Lot 1. Did you receive any other test data sheets relating to Lot 1, and to the temperature, pressure and humidity tests?

A. Yes.

Q. What?

A. Tapes on the results of the shock test.

Q. I was limiting myself to the temperature, pressure and humidity tests for the moment. Did you receive any other papers relating to those tests?

A. No, sir.

Q. And what did you do, if anything, after receiving those papers?

A. I analyzed the information given to me, and based upon this information and an analysis of it I decided whether the material would be accepted, the lot represented would be accepted, or rejected.

Q. And on what basis did you decide whether it should [fol. 155 A-42] be accepted or rejected?

Mr. Angoff: I object, unless the tapes are in evidence.

The Court: At the moment he is just describing the general procedure, and the objection is overruled.

Q. On what basis did you decide?

A. Based on the lot size, the type of defects, and the amount of defects found.

Q. Now, what types of defects might be found?

The Court: You don't really mean that. What types of defects were shown, what did you see?

Q. What types of defects did you see in the tests?

Mr. Angoff: I object.

Mr. St. Clair: Maybe we ought to find out if he saw any.

A. That is a fair suggestion.

Q. From time to time during the testing, did you find any defects?

The Court: Did you see reports of defects; isn't that it? Maybe I misunderstood.

Mr. Caner: Well, let me rephrase the question, if the Court please. Did the results submitted to you from time to time disclose any defects?

Mr. Angoff: I object.

The Court: You may answer that. Were there on the [fol. 155 A-43] reports to you statements of defects?

Mr. Angoff: Is he talking about tapes, your Honor?

The Court: That is what I understood, reports and statements and tapes of the type involved in Exhibits 16, 17 and 18, and indeed, earlier than that, 13, 14 and 15. Isn't that what you were including?

Mr. Caner: That is right, your Honor.

The Court: On Exhibits 13 through 18, which are samples, there are statements made by other persons, and the question put to you is, did you see on documents like Exhibits 13 through 18 statements of other persons admitting defects?

The Witness: Yes.

Mr. Angoff: Now I ask for those statements.

The Court: You may ask on cross-examination, but you can't interrupt the direct examination. This is merely to find out the general method of procedure. The inquiry was based on Mr. St. Clair's objection that there was no indication there were ever any admissions of defects. Now it appears from this witness' statement that there were admissions of defects. But the question which is next going to be asked, presumably has nothing to do with what the witness did when he found there were admissions of defects?

Mr. Caner: No, if the Court please; I am going to ask what kinds of defects.

The Court: Admitted. This is only of the most general [fol. 155 A-44] nature. Nobody could be hanged for this.

Mr. Angoff: As long as nobody is going to be hanged for it, I have no objection.

The Court: No defendant is going to be convicted before me on a general statement of this kind. I am merely trying to find out what the background is so that a general atmosphere may exist in which the particular question could be put.

Mr. Angoff: I hate to prolong this matter, but I wouldn't like to stand here and let the word "admission" go by without saying there is no evidence that any such statements constitute admissions.

The Court: There is no admission by the defense, but merely by the entrant if he exists.

Mr. Angoff: Thank you very much.

The Court: What kinds of defects were stated by those who entered the reports or tapes, that is the only question. What kinds of defects were stated?

The Witness: The actual reading of the unit obtained was noted on the work sheet.

Q. And on the basis—

The Court: Wait a minute. I don't understand that answer, so I will allow you to go ahead for a moment.

The Witness: The personnel—

The Court: Remember what the question is, and see [fol. 155 A-45] if the answer can be brief within the process of framing the question. The question has got him up to this point, what kinds of defects were stated by those who made entries upon exhibits such as samples 13 through 18 inclusive. Do you want the question read to you again?

The Witness: No, I understand the question. There was no actual statement in itself made, but a notation was made of the readings obtained.

The Court: Then if I understand your testimony, it is that there was information which the entrant put upon Exhibits 13 through 18, or some of them, or documents corresponding thereto, which an alert, intelligent reader would say did not measure up to a standard which that reader had in mind. But there was no statement by the entrant that the report on its face shows a defect.

The Witness: True, sir.

The Court: So the only thing is that there were statements of findings alleged to have been made by the entrant, and those alleged findings were measured against a theoretical standard in the mind of the reader, and the reader said that the findings on some occasions did not measure up to the standard which he proposed to apply to the information reported; is that correct?

The Witness: Yes, sir.

The Court: And you are the fellow who was the reader [fol. 155 A-46] and who applied the standard; is that correct?

The Witness: Yes, sir.

The Court: And therefore, Mr. St. Clair really had a point, that there were no admissions made by anybody about defects, but there were mere statements made which you, when you came to analyze, found were short of the standard which you proposed to apply; correct?

The Witness: Yes, sir.

Q. Now, what standard did you apply with respect to temperature defects?

A. Temperature defects, major and minor categories.

Q. What was the major division?

A. The major division was any unit that deviated more than two degrees from the point at which it was tested.

Q. Now, can you give us an example of such a major defect?

A. Yes. If a unit was tested at the minus 50 degree Centigrade level, and the code obtained from that unit was a code which on the interpretation from the chart showed to be 47, then that unit deviated 3 degrees from the 50 degrees, and that would be a major defect.

The Court: I don't understand that answer, and it certainly has so much in it that it will have to be worked out step by step.

Q. Will you give us the answer—?

The Court: It will have to be done by you putting a [fol. 155 A-47] question in order for the witness to know what it is he is supposed to answer. He is referring to lots of things which I have an idea about but not too clear a picture.

Q. In analyzing the test data sheet relating to temperature, what would be the first figure which you would look at?

A. The code letters.

Q. And will you give us the hypothetical—a code letter for what point?

A. For the minus 50 degree Centigrade level.

The Court: What is the code?

Q. Will you give us the hypothetical—?

The Court: No, there is no hypothetical there; it is absolutely fixed.

Q. What is the code letter for minus 50 degrees Centigrade?

A. It varied on unit to unit.

The Court: Take the one that is fixed for a particular unit. Take Lot 1.

The Witness: The first unit in Lot 1 is GM.

The Court: GM represents minus 50 degrees Centigrade for the particular radiosonde being tested in Lot 1?

The Witness: No, I will have to correct myself. That is 49.4 degrees.

The Court: Well, you know a difference of a degree means a great deal when you are dealing with murder, larceny or temperature.

[fol. 155 A-48] Q. So that with respect to this first lot at minus 50 degrees you received what code, if any?

A. GM.

Q. Was that the code that was apparently set at minus 50 degrees Centigrade?

The Court: Minus 49.4.

Q. Was the reading obtained at minus 49.4?

A. No, the reading was obtained at 50 degrees, minus 50 degrees Centigrade.

The Court: Didn't you just tell us GM meant 49.4?

The Witness: Yes.

Mr. Caner: Now, may I clarify that?

The Court: The witness can on a question by you, yes.

Q. Well, will you tell us what the figure or number minus 49.4 is on that sheet?

A. That is the reading obtained from the calibration chart for the code letters GM under the temperature column.

Q. So do I understand that that sheet shows that when that unit was tested at minus 50 degrees Centigrade it returned the code GM, right?

A. Yes.

Q. And that by reference to the chart of the unit, the temperature at code GM, assuming the unit was accurate, would be 49.4; is that correct?

[fol. 155 A-49] A. Yes.

The Court: I am sorry, I am mixed up. GM is 49.4; correct?

The Witness: Yes, sir.

The Court: If the instrument is properly calibrated, then, at 49.4 it sends out the signal two dashes and a dot, and two dashes; correct?

The Witness: No, sir.

The Court: Well, why not?

The Witness: I haven't got the chart for this particular unit.

The Court: Well, you had better think about it, and get whatever you need to cover this. It is rather critical.

The Witness: The charts have gone out with the units.

The Court: Can't you take one that you can use as an illustration, that is in the court room?

The Witness: Yes, I would have to dig one out.

The Court: All right, we will start all over again.

Mr. Caner: May the record show that I am giving the witness—?

The Court: A piece of paper, which I will mark Exhibit 19 for Identification. It was taken arbitrarily out of the radiosonde which is Exhibit 1, and is being used solely for the purposes of illustration of how a signal given with respect to a temperature condition would be reported in [Vol. 155 A-50] Morse Code by the radiosonde.

(Paper removed from Exhibit 1 marked Exhibit 19 for Identification.)

The Court: Now, will you look, please, at a minus 50 degrees temperature reading and tell us what letters would be sounded out?

The Witness: KD.

The Court: Dash dot dash, dash dot dot, right?

The Witness: Yes.

The Court: Now, if instead of it being exactly minus 50 degrees Centigrade the temperature were 49 degrees Centigrade, what would the reading then be? Or some other figure; you don't have to use 49 if I have taken a bad illustration.

The Witness: It would be KG or KK.

The Court: It would be KG; that would be dash dot dash, dash dash dot; right?

The Witness: Right.

The Court: Or what?

The Witness: KK.

The Court: Dash dot dash, dash dot dash. So that at minus 49 degrees there are alternate signals; is that clear?

The Witness: Yes. The charts are not exactly in the relationship to the 1 degree, 2 degrees.

The Court: Then tell us where it is exactly keyed so [fol. 155 A-51] that we don't make any mistake.

The Witness: 49.4.

The Court: All right, at 49.4 degrees, the signal is KG?

The Witness: Yes, sir.

The Court: Dash dot dash, dash dash dot. And at what is the signal KK?

The Witness: 48.8.

The Court: Now, if by some chance the actual reading were 49.1 degrees, which is midway between the last two things you have told us, what will it do? Will it alternate between the two signals, or send them blurred?

The Witness: No, the possibilities are that it will alternate between the two signals, or pick one group and stay in that group.

The Court: Well, it is not precisely accurate at the break even point?

The Witness: Yes, sir.

The Court: That is the only thing that isn't accurate if the reporting is by a machine that is competent and not defective?

The Witness: Yes, sir.

The Court: Now you can go back.

Q. Now, with respect to the unit relating to this calibration chart, Government's Exhibit 19 for Identification, the [fol. 155 A-52] signal supposed to be returned at minus 50 is KD, right?

A. Yes.

Q. Now, will you tell us under what circumstances you might receive a defective reading in the case of that unit?

A. If the reading obtained was the code letters KN.

The Court: Well, now, wait a moment. That is the first we have heard about that. What does that represent? That is dash dot dash, dash dot.

The Witness: The temperature of minus 46.7 degrees.

The Court: That is a defect, in other words, the temperature being minus 50 degrees it gives out a signal which is only appropriate for minus 46.7 degrees, or the other way around, the temperature is 46.7 degrees and it gives out a signal minus 50 degrees; which are you assuming?

The Witness: No, the unit is giving out the signal KN, 46.7.

The Court: When the fact is that the temperature is minus 50 degrees?

The Witness: Yes, sir.

The Court: So that the machine is really off 5 per cent?

The Witness: 3.3 per cent, sir.

Q. Is that 3 per cent of degrees?

A. Degrees.

The Court: That is about 5 per cent.

[fol. 155 A-53] Q. Now, how many degrees does a machine have to be off in order for there to be a defect?

The Court: From whose point of view?

Mr. Angoff: That is it. I object.

The Court: From my point of view it might be a serious defect, and from the point of view of somebody else it might be of no consequence.

Q. In deciding yourself what was a defect and what was not a defect, what standard did you use?

Mr. Angoff: I object.

The Court: That is all right. What standard did you use?

The Witness: I used the specification.

The Court: What specification?

The Witness: MIL R 11005-B.

Q. Now, I show you Government's Exhibits identified as Exhibits 2-E and 3-C.

The Court: Those are the contracts?

Mr. Caner: The specifications.

The Court: Well, they are part of the contract.

Mr. Caner: Yes.

Q. Can you identify that document?

A. Yes.

Q. What is it?

A. That is the document used by me for the inspection of these units.

[fol. 155 A-54] Q. Is that MIL R 11005-B?

(Discussion off the record.)

Mr. Mitchell: In order for the record to be straight, I think this was Exhibit 2-F.

The Court: 2-F is correct, and 3-D. 2-E and 3-C are one, and 2-F and 3-D are one. The first identification specification is Exhibit 2-E and 3-C, and the second is 2-F and 3-D. Now, which is it?

Mr. Caner: The document to which I refer, and the document which the witness identified, is Government's Exhibit 2-E and 3-C, otherwise known as MIL R 11005-B.

The Court: Mr. Mitchell is in error.

Q. Now, what part of this paper did you refer to in arriving at the standard which you applied?

A. The performance data on the calibration Table 6.

Q. No, what part of MIL R 11005-B did you refer to in arriving at the standard of what a defect was?

The Court: What page? Just point to it.

The Witness: Page 13.

Q. Any particular part of that page?

A. Yes, Table 6.

The Court: Well, will you read that aloud, if it is relevant?

Mr. Caner: Yes, your Honor. It is Table 6, Statistical [fol. 155 A-55] Sampling. There are four columns. The first column is labeled "Test," the second column is labeled "Procedure"; the third column is labeled "Minor Defects," and the fourth column is labeled "Major Defects."

Then there are two, and on the next page a third, horizontal columns. The first horizontal column is labeled "Pressure Test." The first column in pressure test—

The Court: We are not concerned about that at the moment. We are dealing with temperature.

Mr. Caner: Going to the temperature test, the first

column under the label "Test" states "Maximum Calibration Error," and then there is a column headed "Procedure" and the reference is 4.12.

The Court: Does it say degrees or per cent, or what?

Mr. Caner: No, it is a reference to the paragraph, I believe, in the specifications.

The Court: All right. Haven't we got to now look at the paragraph which is incorporated by reference?

Mr. Caner: I will read the paragraph, 4.12, headed Temperature Element Calibration (reading):

"The instrument under test shall be placed in a test chamber at ambient pressure, readings of true temperature and code group shall be taken at minus 50 degrees, [fol. 155 A-56] minus 30 degrees, minus 10 degrees, plus 10 and plus 30 degrees Centigrade, and plus or minus 2 C."

The Court: That is the one you are really relying on, isn't it, or plus or minus 2 C.?

Mr. St. Clair: May I suggest that is probably a misprint and it should be plus or minus 2 degrees Centigrade?

Mr. Caner: Yes.

The Court: I think we will agree on that.

Mr. Caner (continuing):

"The temperature shall be stabilized at the reading value so that the true temperature does not change more than .2 C."—

again I believe it should be .2 degrees—

"for at least one minute during reading. The true temperatures shall be compared with the calibration table values and the differences noted. The voltage applied to the motor may be raised to 6 volts during this test if necessary to produce sufficient speed for clear keying at the low temperatures."

Mr. St. Clair: May I have read back the part beginning with 6 volts?

(The statement was read.)

Mr. Caner: Returning to Table 6, and to the temperature [fol. 155 A-57] test column, the next column is headed "Minor Defects," and the reading is more than 1.5 C. but not more than 2 C.

The Court: Does it say degrees?

Mr. Caner: It does not, your Honor.

The Court: I think everybody understands that the omission of the degree symbol has no significance and the document should be read as though there were a degree symbol.

Mr. Caner: And this is on the same line as Maximum Calibration Error; in other words, that is the heading which carries through and is applicable to just what I have just read, namely, more than 1.5 C. but not more than 2 C.

The Court: Would you just take a red pencil and mark those portions of that exhibit which you had read aloud, including not only the main part but the cross reference to 4.12, in case at a later date the Jury wants to look more particularly at that aspect of the exhibit?

Mr. Caner: Yes, your Honor (complying). I have some more reading to do.

The Court: All right.

Mr. Caner: Now, the fourth column is headed "Major Defects," and it states "More than 2 C."

The Court: That may also be marked in red.

Mr. Caner: Yes, your Honor (complying). And the second heading for temperature test, namely, the heading [fol. 155 A-58] below the heading "Maximum Calibration Error," that second heading is "Maximum Discontinuity of Table." Then there is a paragraph reference 4.8.6. Does the Court wish me to read that?

The Court: If it has any relevance. I have never read it.

Mr. Caner: The paragraph provides that the calibration tables shall be neat, clear, and in accordance with the model—

The Court: Is this really necessary?

Mr. Caner: I don't think so.

The Court: The Jury will disregard the neat and clear part of these; there isn't so much that is neat and clear.

Mr. Caner: If the Court please, the only relevant column is the column "Maximum Calibration Error," which has just been reviewed with respect to the temperature test, so I will mark that portion.

Mr. Angoff: I would just like to take a minor look at that.

The Court: To see if there is a major defect?

Mr. Angoff: Yes (examining).

Mr. St. Clair: I suppose there is no claim of any wrongdoing with regard to the second aspect of the temperature test, to wit, the maximum discontinuity of table.

The Court: It has nothing to do with any evidence I [fol. 155 A-59] have heard.

Mr. St. Clair: Well, if he—

The Court: He doesn't have to make any disclaimers. When he gets done and there is anything that will stand a motion for acquittal, I will deal with that. He doesn't have to admit there are gaps, if there are gaps.

Mr. St. Clair: That is correct. I didn't want it interpreted as a statement that had any relevance.

Q. Now, passing from the temperature test to the pressure test, what did you do after you received the test data on the pressure test?

A. I analyzed the test data and based upon the analysis and the amount of defects, type of defects, I made a decision on whether the lot was accepted or rejected.

Q. And did you apply any particular standard of defects in connection with the pressure test?

A. Yes.

Q. Was that standard set out in any document?

A. Yes, in MIL R 11005-B.

The Court: That is the same document you just referred to?

The Witness: Yes.

Q. And any particular part of that document?

A. That would be on Table 6.

The Court: Do you have a blue pencil, Mr. Caner? If [fol. 155 A-60] not, I have one (handing).

Mr. Caner: I will read from Table 6. Again we have the four columns, Test, Procedure, Minor Defect and Major Defect. Under the horizontal heading Pressure Test we have first of all this horizontal column and the words "Setting Error" under the heading Procedure. And under the word "Procedure," incidentally, in parentheses, the word "Sub-paragraph," is the reference 4.11.1. Turning to that paragraph—

The Court: Mark that in blue if you have—well, I will let you read it first to make sure there is something relevant.

Mr. Caner: 4.11.1 (reading):

"Calibration at room temperature and zero error set. The instrument under test shall be placed in a test chamber and the pressure reduced to 150 millibars or less and maintained at this value for a minimum of ten minutes. The pressure shall then be increased at a rate not in excess of 50 millibars per minute. Readings of true pressure and corresponding code groove shall be taken at approximately 100 millibar intervals from 150 to 1060 millibars, one reading being taken at the code groove closest to 990 millibars [fol. 155 A-61] indicated pressure, one reading at a true pressure below 160 millibars, and one reading at a true pressure in excess of 1030 millibars. At the reading points the rate of change of pressure shall be decreased to a value not in excess of 5 millibars per minute, and the readings shall be taken at the first transmission of a code groove. The true pressure values shall be compared with the calibration table values and the difference noted as follows:

(a) The difference at the 990 millibar code groove.

(b) After algebraic correction of all differences, in terms of percentage of code groove, for the difference obtained in (a) above, the corrected difference should be noted.

The corrections shall be determind as follows:

Correction at groove X equals
Correction at 990 millibar groove
over
width of 990 millibar groove in millibars multiplied by width of groove X in millibars."

The Court: Would you read that last over again?

(Mr. Caner complied.)

[fol. 155 A-62] The Court: Mark that in blue, please.

Mr. Caner: Yes, sir (complying). Now, returning to the main test of Table 6 under the heading "Minor Defect," and in the column corresponding to Setting are the words "Minor Defect, more than 4 millibars but not more than 7 millibars. Major Defect, more than 7 millibars."

Passing to the next horizontal column—

The Court: Wait a minute. That is the end of the blue marking. We are now going to the green marking, because you are now talking about something which is temperature, and is not pressure.

Mr. Caner: No, it will still be pressure. I have just read the first column relating to the pressure test. I am now passing to the second column headed "Maximum Error at Room Temperature," and Paragraph 4.11.1. Under the heading "Major Defect," with regard now to maximum error at room temperature, are the words "More than 5 millibars, but not more than 8 millibars."

The Court: I think you said major defect.

Mr. Caner: It should be minor defect.

The Court: More than 5 and less than 8.

Mr. Caner: But not more than 8. So that minor defect is more than 5 millibars, but not more than 8 millibars. And the words under the column, "Major Defect" are "More than 8 millibars." Now, passing to the third horizontal [fol. 155 A-63] column relating to pressure tests, the heading "Maximum Error at Cold Temperature," the paragraph reference is 4.11.2.

The Court: That is a different paragraph. You will have to read that and mark it in blue.

Mr. Caner (reading):

"4.11.2 Calibration at Low Temperature. The test of 4.10.1"—

and if I may interject here, I believe that is also a misprint; it should be 4.11.1.

Mr. St. Cair: I have no such information on that.

The Court: No, but it is a transparent error, isn't it?

Mr. Caner: Yes, it is.

Mr. St. Clair: Well, let him read it, and we will come to some conclusion about it.

The Court: It obviously refers to the preceding paragraph.

Mr. Caner (reading):

"The test of 4.10.1 shall be repeated with the temperature chamber 65 degrees to 70 degrees Centigrade less than room temperature. The true pressure shall be obtained at the same code grooves which were energized in the calibra-

tion at room temperature. The difference in true pressure [fol. 155 A-64] or identical code grooves between the two tests shall be noted. The voltage applied to the motor may be raised to 6 volts during this test if necessary to produce sufficient speed or clear keying at low temperatures."

Now, returning to the table, we are concerned with the third horizontal column, namely "Maximum Error at Cold Temperature," I have read Paragraph 4.11.2, and under the column "Minor Defect" the words "More than 4 millibars but not more than 7 millibars." Under the heading "Major Defect" the words "More than 7 millibars."

That concludes the relative portions of the reading of the pressure test, and I shall place a blue line around that.

Mr. St. Clair: I am satisfied that the specifications as printed are in error, and that 4.10.1 should read 4.11.1.

The Court: Thank you.

Mr. Angoff: I have no objection to the marking.

Mr. Caner: Now with respect to the humidity test.

The Court: Now you had better change to the green pencil, if you will.

Q. What did you do, Mr. Palliotto, after you received the test data on the humidity test?

A. I analyzed the test data and based on the categories [fol. 155 A-65] of defects listed in the specifications I made a decision on whether the lot was accepted or rejected.

Q. And what portion of the specifications did you refer to?

A. That is Table 6.

The Court: It is the same Table 6 you referred to previously?

The Witness: Yes, sir.

The Court: You may read those portions of the table which are relevant.

Mr. Caner: Under the horizontal heading "Humidity Test; Maximum Calibration Error; Procedure," Paragraph 4.13, from which I read (reading):

"Humidity element calibration. The instrument under test shall be conditioned by storing for six hours at room

temperature and at a relative humidity of not less than 80 per cent. After conditioning, the instrument shall be placed in a test chamber at ambient temperature, and pressure and subjected to the following stable humidities in order: 50, 90, 50, 25, and 50, all plus or minus 5 per cent, relative humidity. Code grooves corresponding to the true relative humidities shall be noted. The differences between the true values of humidity and the calibration table values [fol. 155 A-66] shall be noted."

Returning to Table 6, in the horizontal column headed "Humidity Test," I have read the first two vertical columns. The third vertical column is headed "Minor Defect," and the words there are "More than 5 per cent relative humidity, but not more than 10 per cent relative humidity." Then for "Major Defect," the words "More than 10 per cent relative humidity."

The Court: All right, you may mark that in green.

Mr. Caner: Yes, sir (complying).

The Court: As I understand it, these are the standards which you applied with respect to facts alleged to be reported upon sheets which you received of the type of Exhibits 13 to 18; is that correct?

The Witness: Yes, sir.

Q. Now, given the number of units tested and the number of defects and the type thereof, how did you decide whether to accept the lot or reject the lot?

Mr. Angoff: I object. That question is too broad. It allows for opinion, it allows—

The Court: I think I will allow him to answer it in this form. Did you have a written rule which you applied with respect to rejections of lots? Yes or No.

The Witness: Yes, sir.

The Court: From where did you derive that written [fol. 155 A-67] rule?

The Witness: From the correspondence received from my office, and a telephone conversation from my office.

Q. Did you receive a memorandum concerning a rule for acceptance or rejection?

A. Yes.

Q. And based upon that memorandum did you send any memorandum to any other person?

A. Yes.

Q. To whom?

A. Fong Foo.

Q. Now, I show you a paper and ask if you can identify it?

A. Yes.

Q. What is it?

A. That is the paper that—a copy of the paper that I sent to Mr. Fong Foo.

Q. And what is it dated?

A. It is dated the 20th of March 1957.

Q. And does it set forth—

The Court: It speaks for itself.

Mr. Caner: I offer it.

Mr. Angoff: May I look at it a moment, if your Honor please? It is now offered as an exhibit?

The Court: It is now offered as an exhibit. It is marked for identification at this time as Exhibit 20 for identification.

[fol. 155 A-68] (Paper dated March 20, 1957, sent by Mr. Palliotto to Mr. Fong Foo marked Exhibit 20 for Identification.)

(All counsel examine the document and return it.)

The Court: Exhibit 20 is admitted.

(Exhibit 20 for Identification received in evidence.)

The Court: The government said it would reject lots if the percentage of defective instruments was higher than the figure set forth in the memorandum.

Mr. Angoff: Now, if he has any more of these and will give them to me in advance, we can save some time.

The Court: Do you have any more? If you want to take an adjournment for the day, I have no objection.

Mr. Caner: I have only one.

The Court: All right, go ahead.

Q. Now, will you give us an example, Mr. Palliotto, of a situation in which you would reject a lot for temperature, pressure or humidity defects?

A. If my analysis of the test results of the lot show that on five units which were inspected of that lot they contained two minor defects for temperature, then that lot would be rejected. If it contained two major defects, it would also [fol. 155 A-69] be rejected. Or if it contained one major defect and the previous two lots of five each contained no major defect, then that lot would be accepted.

If one of the previous two lots contained one major defect, and the third lot that I have just inspected contained a major defect, then that lot would be rejected.

And the same thing holds true for pressure, temperature and humidity.

The Court: If I understand it correctly, you are merely reciting what appears in the memorandum?

The Witness: Yes, sir.

Mr. Caner: I asked him to give an example.

Q. Now, how many units were customarily in a lot?

A. 200.

Q. And how many units did you customarily sample out of a lot for temperature, pressure and humidity?

A. 5 for temperature, 5 for pressure, and 5 for humidity.

The Court: You told us that already, I think, but it isn't your fault if the question is put to you again.

Q. We have reviewed the test data sheets and the submission sheets for Lot 1. Now, after Lot 1, were other lots submitted to you for temperature, pressure and humidity tests?

A. Yes.

Q. What lots were submitted to you?

A. Approximately 200 lots.

[fol. 155 A-70] Q. And did those lots relate to one of the contracts or both of the contracts?

A. Both contracts.

Q. And how many radiosondes were included in those 200 lots?

A. Approximately 39,200.

Q. Now, there has been introduced in evidence the submission sheet for Lot 1. Did you receive submission sheets on the lots from 2 to 200?

A. Yes.

Q. Did these sheets contain any additional or different information than the sheet for Lot 1?

Mr. Angoff: I object, the sheets speak for themselves.

The Court: They do.

Q. Were there any submission sheets that were in any way different from the sample sheet?

Mr. Angoff: I object, your Honor.

The Court: Well, of course they were different. The samples had particular data on them, and the sheets have other particular data on them.

Q. Was there any additional subject matter that was covered by any later submission sheets?

A. Yes.

Q. Would you produce it?

The Court: The new form of sample?

[fol. 155 A-71] Mr. Caner: The new form of sample, the first such sample, the first such submission sheet.

(The witness complied.)

Q. This is a yellow sheet headed "Lot No. 24," is it not?

A. Yes.

Mr. Caner: May it be marked for identification?

The Court: It may be so marked, Exhibit 21 for Identification, Lot No. 24, a sample of a different form of return if it may be called that, prepared by an entrant and submitted by an entrant unknown to us by name, and received by the witness, it being a form later than the form used in Exhibit 9 for Identification. It is one that the witness received from an unknown person. It may be a gentleman, or maybe it is a lady.

Q. Do you know from whom you received that sheet?

A. Yes, sir.

Q. From whom?

A. Mr. Sawyer.

Q. Now, what writing did that sheet have upon it when you received it from Mr. Sawyer?

A. The date, the lot number, the signature of Mr. A. R. Sawyer, the item number, the quantity, and under the serial number heading attached list, an ambient type test, with a check mark.

Q. I see numbers along the sides. Were those numbers [fol. 155 A-72] there when you received the paper?

A. No, sir.

The Court: The numbers are to be disregarded entirely. The rest of the exhibit is admitted as Exhibit 21.

(Exhibit 21 for Identification received in evidence.)

The Court: Is there anything else you are going to ask about that exhibit?

Mr. Caner: No, your Honor.

Mr. Angoff: Does counsel for the government claim—?

The Court: He doesn't have to claim anything at the moment. This business of challenging things in the middle of trial, I don't like.

Mr. Angoff: All right.

Mr. Caner: I offer it as a sample and evidence of submission.

The Court: In so far as Sawyer acted for the corporation in this matter, and I would suppose there is sufficient basis for saying he was authorized to make this kind of report for the corporation, it would appear to be admissible against the corporate defendant.

Q. Did you observe the operation of the shock test?

The Court: That is more than a 10-minute matter, isn't it?

Mr. Caner: I am afraid it is.

[fol. 155 A-73] The Court: We may as well take the recess until tomorrow at ten o'clock.

(Adjourned to 10 a.m., Tuesday, September 13, 1960.)

[fol. 156]

FOURTH DAY

Court Room No. 6
Federal Building, Boston
Tuesday, September 13, 1960

CONSTANZ PALLIOTTO, Resumed

Direct examination.

By Mr. Caner, Continued:

Q. When we paused yesterday, I believe I had asked you a question concerning the shock test. Now, do you have a shock test submittal sheet for Lot 1?

A. Yes.

Q. Has that sheet already been identified by you?

A. Yes.

Q. I show you a paper and ask you if you can identify it?

A. Yes, that is the sheet for the shock test submittal.

Mr. Caner: And may the record show that I have shown the witness Government's Exhibit 15.

Q. Now, did you observe how the shock test was done?

A. Yes.

Q. How was it done?

A. I selected three samples from the lot.

Q. Now, would you use the chart and tell us at what point you selected the samples and what was done thereafter?

A. After Operation 14, that is, the operation under final [fol. 157] operational station, Sig. C, I selected three samples for the shock test, and I turned the three samples over to Mr. Sawyer, and he proceeded to run the various tests on them. The first operation was that he took these three units from this position here (indicating)—.

The Court: What was this position?

The Witness: At 14, over to position 4, at the left in the second row, called pressure zero set, checked the pressure at a specific point, then the unit was brought over to this

chamber, towards the bar which is No. 2, called the temperature zero set, and obtained readings around 30 degrees Centigrade. These were—I will have to correct myself.

The Court: I don't quite understand what you have just said. You got a reading from 30 degrees Centigrade. What has that got to do with the shock test?

The Witness: I will have to correct myself, sir, on that. That is not the position that we used at that particular time, due to the fact that we had varied operations, but my memory is kind of lax, and I have to remind myself just where we had it.

Q. Which time do you refer to?

A. The first lot.

Q. And that is in October 1956?

A. Yes.

Q. And you are describing the procedure in running [fol. 158] the shock test with respect to that first lot?

A. Yes. At position 14 we checked temperature, I observed the checking of the temperature on that unit, which was room temperature, and also a tape was made showing the dots and dashes. At the pressure stage here we did not maintain a tape at position 4. After this operation, the units were brought over to position 15, which is on the extreme center right of chart, and each unit was put individually into a container and dropped approximately 30 inches and allowed to fall free.

After it had fallen free and stopped moving, the unit, and the other units that had been subjected to the shock at position 15 were brought back and the same operations at operation 14 were repeated, and the results obtained after the shock were compared with the results obtained before the shock.

Q. Now, were any other lots besides lot 1 submitted for shock test?

A. Yes.

Q. What lots?

A. All of them.

Q. Did you select any customary number of samples for the shock testing of those lots?

A. Yes.

Q. What was the number?

A. In October 1956 the lot sizes being under 181, three samples were selected. Then after the lot sizes increased [fol. 159] to 200 units or so, we selected seven samples. Then based on the analysis of the results of so many samples, I put the contract on reduced sampling, and from then on I selected, or my subordinate selected, only three samples.

The Court: So you took three for each 200?

The Witness: Yes, sir.

Q. Now, did the procedure of operating the shock test change in any way after the test describing on lot 1?

A. Yes.

Q. What was the change that was made?

A. After several lots, I did not witness each and every lot thereafter for the shock test. Mr. Sawyer or Mr. Pemberton or Mr. Faria were allowed to proceed with the shock test and submit the test data results to me.

The Court: I am going to strike that answer and require you to say who it was that said to Sawyer or Pemberton or Farrier (sic) that they could submit the results to you?

The Witness: I did, sir.

The Court: Now, that is a perfect illustration of why you have to use the active and not the passive. Anybody who listens to your testimony until you gave the further answer would not know whether the authority came from you or from one of the defendants.

And I caution you again that this is a criminal trial, and you must not use the passive, and you must on every occasion state clearly who it is that said something, au- [fol. 160] thorized something, or who writes a letter. And I think by now you must see why that instruction is given.

The Witness: Yes, sir.

Q. Did you have any standard which you applied in determining whether a lot ought to be accepted or rejected on the basis of a shock test?

A. Yes.

Q. And what was the standard that you applied?

A. The specification Mil R11005-B.

Q. And without referring to the document for the moment, will you tell us what the standard was?

Mr. St. Clair: I object.

The Court: Well, that objection is certainly sustained. You may read it. Is it a reference to Mil R11005-B? That is the one we have previously had, and therefore you are going to mark with a wavy red pencil the part that you are now going to read.

Mr. Caner: And this is also Government's Exhibits 2-E and 3-C.

The Court: Yes.

Q. Now, did you refer to any particular part of Government's Exhibit 2-E and 3-C in arriving at the standard you applied?

A. Yes.

Q. What part?

A. Table 5.

[fol. 161] Q. On Page—?

A. On Page 13.

The Court: Now, you may read that.

[fol. 162] Mr. Caner (Reading): "Table V, Government Group B inspection." There are five columns, five vertical columns, and each column has a heading. The first heading is Inspection and under that is the word Shock. The next column is headed Requirements Paragraph, and beneath that heading it numbers three paragraphs. The first paragraph referred to is 3.4.5.7, which I will now read.

"3.4.5.7 Shock. When subjected to the shock test of 4.16" —I will read that paragraph after I finish reading this paragraph—"When subjected to the shock test of 4.16. the pressure element calibration shall not be displaced by more than plus or minus three millibars." Now reading Paragraph 4.16. "Shock Test. The instrument, less parachute, shall be suspended on its hangers, as when attached to the battery compartment section of the parachute housing. The instrument shall then be subjected to a shock of 40 plus or minus 5g by dropping it through a suitable distance when attached to a cable which is fastened to a rigid support, the shock being applied by the cable as it becomes

taut. The instrument shall then be visually inspected for damage, and then tested. The instrument shall be capable of meeting all the requirements of this specification after this test."

Now referring back to Table V and the Requirements Paragraph, the heading thereof, the next section referred to is 3.5.4.6, which provides—"3.5.4.6 Shock. When sub-
[fol. 163] jected to the shock test of 4.16 the temperature element calibration shall not be displaced by more than plus or minus 1.0 degrees Centigrade."

The next paragraph referred to in Table V—

The Court: Will you read that again, please, that last part?

Mr. Caner: "Shock. When subjected to the shock test of 4.16 the temperature element calibration shall not be displaced by more than plus or minus 1.0 degrees Centigrade."

The Court: Once again. "Plus or minus", and what is the last part of it?

Mr. Caner: "plus or minus 1.0 degrees Centigrade." 1 degree Centigrade.

The next paragraph referred to in the second vertical column of Table V is 3.6.3.6, which reads: "Shock. When subjected to the shock test of 4.13 the humidity element calibration shall not be displaced by more than plus or minus 3 per cent relative humidity."

I believe that "4.13" is a type error and should be "4.16", your Honor.

4.13 is the paragraph relating to "Humidity element calibration."

The Court: Do you agree that is an error?

Mr. St. Clair: It would appear to be another error, if your Honor please.

[fol. 164] Mr. Angoff: I cannot agree. I do not know either way.

Mr. Caner: I would be happy to read that paragraph.

The Court: I don't think you need to. I am quite prepared, as a matter of construction, to say that that is obviously an error.

Mr. Angoff: I am not taking any position, your Honor.

Mr. Caner: The next vertical paragraph is headed Test Paragraph, and the reference given is 4.16. The next heading is headed Group B Plans, and the reference is B-4. That is understood in connection with the next heading, your Honor, which heading is Table VII.

Now referring to the tables of the specifications I observe a Table VIIa and a Table VIIb.

The Court: I am going to interrupt you. Have you been putting a wavy red line aside everything you have read up to now?

Mr. Caner: I was going to do it at the end.

The Court: Suppose you do it right now before you forget what you have been reading?

Mr. Caner: (A pause.) I have now done so, your Honor.

Q. Now, Mr. Witness, will you tell me which of the two tables VIIa and VIIb you referred to?

[fol. 165] A. I referred to on the first lot Table VIIa and then later to Table VIIb.

Q. Table VIIa has as its first heading Lot Size. Thereafter it has three major headings in vertical columns, namely, Reduced Inspection, Normal Inspection and Tightened Inspection. Each one of these vertical columns is subdivided into a subheading, namely, Sample Size and Acceptance Number. Now under the first heading of Lot Size there are various horizontal columns of different Lot Sizes, the first being 9 to 25, inclusive and the last being 22,001 and over. Now which of those Lot Size sections did you refer to?

A. On the first lot it would be the quantity 66 to 180, inclusive.

Q. With respect to that Lot Size heading 66 to 180, inclusive, the Sample Size is 3 and the Acceptance Number is 1. Under the heading Reduced Inspection, under the heading Normal Inspection, Sample Size 3 and Acceptance 1, and under Tightened Inspection, Sample Size 7 and Acceptance No. 1.

The Court: Will you mark that, please, with a wavy red line.

Mr. Caner: Yes, your Honor.

The Court: I do not want to repeat it each time. When you read a paragraph please mark it.

Q. Did there come a time when you used the Lot Size 181 to 500?

[fol. 166] A. Yes.

Mr. Caner: That paragraph or that heading reads: "181 to 500, inclusive, with respect to reduced inspection three samples, under Sample Size, and Acceptance No. 1, and with respect to Normal Inspection, Sample Size 7, Acceptance No. 2, and in the case of Tightened Inspection, Sample Size 11, Acceptance No. 2."

Q. Now under what circumstances did you use Table VIIb?

A. Table VIIb was used after the test data for a certain amount of lots under the Normal sampling of Table VIIa was computed, the established quality—the acceptable quality level and the process average was computed and the information was compared with Table VIIb, and Table VIIb had three limits of inspection specified, which was Limit A, Limit B and Limit C. Based on that data I evaluated the lot, whether the material would be inspected under the Reduced Plan or the Tightened Plan.

Q. Or the Normal Plan?

A. Or the Normal Plan, yes.

Mr. Caner: Does the Court wish me to read Table VIIb?

The Court: Without having it more explicitly pointed out than it has been, just by being introduced, that is erroneous and it therefore has to be read. The jury has to [fol. 167] know exactly what it is that was used as a standard. The record has to show it very clearly. Therefore, if this was used as a standard it must be read.

[fol. 168] Mr. Caner: Table—

The Court: I understand you used this as a standard; is that correct?

The Witness: Yes, sir.

The Court: Then will you please read the standard, Mr. Caner?

Mr. Caner: Table 7-B, Group B-4, Limits of Process Average. There are four vertical columns. The heading of the first is N, the heading of the second is Limit A%, the

head of the third column is Limit B%, the heading of the fourth column is Limit C%.

The first horizontal column is 10. Under Limit A%, 34.27; under Limit B%, 23.63, and under the fourth column an asterisk. Referring down to the bottom of the column, there is a line beside the asterisk stating, "Asterisk: Number of sample units included in estimated process average is insufficient for reduced inspection." That was with respect to the number 10.

Now, number 11, Limit A%, 33.28; Limit B%, 23.14; Limit C%, asterisk.

Under 12, Limit A%, 32.42; Limit B%, 22.71, and Limit C%, an asterisk.

May I inquire of the witness, to shorten the reading, if the Court please?

The Court: Yes.

Q. Was there any particular part of this table that you [fol. 169] referred to?

A. The range between 50 and 99.

Mr. Caner: All right.

The Court: Now, will you please carefully mark what you have so far read? And will you mark what you read hereafter. Please don't make me say this every time.

Mr. Caner (complying): Starting at the Column N, 50-59, Limit A%, 22.51; Limit B%, 17.76; Limit C%, 6.49.

60-69, 21.68 for Limit A, 17.34 for Limit B, and 4.33 for Limit C.

70-79, Limit A%, 21.04; Limit B%, 17.02; Limit C%, 4.96.

80-89, Limit A%, 20.52; Limit B%, 16.76; Limit C%, 5.48.

90-99, Limit A%, 20.09; Limit B%, 16.54; Limit C%, 5.91.

Q. Did you use any other portion of that table?

A. There may have been several instances where we used another section of the N column. But most of our readings have been within that range of 50-to-99.

The Court: Most of what? Would you read that last sentence?

(The last sentence was read.)

The Court: I am not interested in the plural. The word our has no antecedent. You may say anything you did. You [fol. 170] may not use the word our.

The Witness: Most of my reading has been between the figures 50 and 99 under the Column N.

Q. What do you mean by the word reading?

A. Based on the results obtained from the lots, either five lots or ten lots, the process average was calculated, and it was compared against the—

The Court: Not was compared.

The Witness: I compared them against the limits shown under Columns A, B, and C, and against the amount of samples in the lots represented, and made a decision on whether I would place Standard Coil Products, Incorporated under the reduced normal tightened inspection.

Q. Now, can you give us an illustration of a situation where a lot would be rejected by you for failure to make the shock test?

Mr. Angoff: That is too vague, I believe.

The Court: I will allow him to give an example. You are asked to state an example of the procedure you personally followed when you rejected a lot on account of the shock test.

The Witness: I didn't quite follow that question.

Q. Will you give me an example—

The Court: Well, he doesn't understand it, and I must confess I don't, but I thought maybe the answer would [fol. 171] explain the question. Or perhaps you had better have him describe exactly what he did with the shock test, not by way of example, but by way of narrative.

Q. What did you do with the results of the shock test?

A. I checked the results against the specification for the temperature, pressure and humidity, and if the samples showed defects they were considered rejected.

The Court: Not they were considered.

The Witness: I considered them rejects. And if on a group of three samples in the lot I found two defects, then I would reject the lot.

The Court: Obviously that doesn't mean they were all necessarily bad, but that you were not going to look any more carefully; is that right?

The Witness: Yes, sir.

The Court: That was a rather strange way of doing it, wasn't it?

The Witness: No. The concept today is—

The Court: I understand why you reject something on the basis of a sample if the object rejected is defective. But if I have three men standing in front of me, and I say I am not going to take men without neckties, and I look at the three and two of them have no neckties, and one has a necktie, it is rather strange to reject all three, isn't it?

The Witness: I don't quite follow that.

[fol. 172] The Court: Suppose my test is that I will pass only those people who have on neckties, they are the only ones I am going to admit into the theatre, or whatever I am running.

The Witness: Yes.

The Court: And I pick out of a line of people waiting to go into the theatre three men, and two of them have no neckties on, and the third man has on a necktie, and I reject all three. Isn't that funny?

The Witness: No.

The Court: What? How about the man who has on a necktie?

The Witness: You would accept that, sir, the man with the necktie.

The Court: You would accept it in the sense that he might be in a position where he would have a good lawsuit against the theatre owner. There is no reason for the theatre owner to have rejected him, is there, if the standard is the standard of a necktie and the man has on a necktie. The mere fact that he has been arbitrarily put among three people, two of whom are without neckties, is no reason for rejecting him, is it?

The Witness: No, sir.

The Court: Was there any reason for rejecting, in connection with the sample, any particular instrument as to which no defect was shown?

[fol. 173] The Witness: No, sir.

The Court: All right.

Q. And did you reject that?

A. The sample that passed the test, all the tests, was not rejected.

The Court: I thought you told me it was just a minute ago.

The Witness: No, sir. We have in this specification a paragraph which covers that particular problem.

The Court: I don't care what is in the specification. I want you to tell us what you do when you take a sample and find in the sample three instruments, two of which are defective, what did you do as to the third instrument? What did you do?

The Witness: I accepted the third instrument.

Q. And what did you do with the remainder of the lot?

A. The balance of the lot I returned to the contractor, Standard Coil Products, Incorporated.

Q. And did you have anything to do with the lot after it was returned to the contractor?

A. Yes.

Q. What?

A. The lot was resubmitted to me later on.

Q. And what did you do with it when it was resubmitted to you?

A. I performed the inspection for the required testing that had failed.

[fol. 174] Q. And on the basis of that, what did you do?

A. I made a decision, based on the amount of defects that I found, whether I would accept or reject the lot.

Q. Now, at any time during the contract period, did you have any conversations with Fong Foo regarding the readiness of the material for submission?

A. Yes.

Mr. Angoff: Just a moment.

The Court: I am rather surprised if that is relevant. Is there anything in connection with promptness here involved? Was that the basis of the objection?

Mr. Angoff: Yes, your Honor.

Mr. Caner: Let me rephrase the question, if I may.

The Court: You mean you withdraw the question?

Mr. Caner: I withdraw the question.

Q. Did you have any conversation with Fong Foo as to whether or not material was ready for inspection?

Mr. Angoff: I object.

The Court: Well, I am not going to say why I think that may be relevant, but I can see a relevance, and I will overrule the objection. Did you have such a conversation, Yes or No?

The Witness: Yes.

Q. Did you have more than one conversation?

A. Yes.

[fol. 175] Q. When did you have the first conversation?

Mr. Angoff: I object, your Honor.

The Court: He may answer. I assume that this is relevant in order to show authority of Fong Foo with respect to authorizing inspections. Is that what it is offered for?

Mr. Caner: Precisely.

The Court: If he in fact had such conversations it will then show he acted with respect to the matter. And now I suppose the Standard Coil, through its counsel, Mr. St. Clair, is asking me to restrict this as being admissible only against Fong Foo.

Mr. St. Clair: That is correct.

The Court: And at this stage that is all it is admissible against.

Q. When did you have the first conversation?

A. During the—

Mr. Angoff: Your Honor, in order to save time, I suppose I should object each time—

The Court: What are you objecting to now? The objection seems to me to be unsound, not that I haven't heard unsound objections made in cases before, but this seems to be transparently unsound. The question is whether your client had a conversation with respect to the promptness of inspection.

Mr. Caner: As to whether or not the material was ready for inspection.

[fol. 176] The Court: All right, that is the same thing, said a little differently.

Q. When was the first conversation?

A. Sometime in the first week of October 1956.

Q. And what was said by you to him and he to you in that conversation?

A. Fong Foo told me that the material was ready for inspection and that he would like to have the inspection by myself, and I in turn told Fong Foo that if the material was ready for government inspection to submit that on a submittal sheet.

Q. Now, during the month of October 1956 did you have any other conversations with Fong Foo on that subject?

A. Yes.

Mr. Angoff: If your Honor please, the submittal sheets are in. It seems to me they speak for themselves.

The Court: They may speak for themselves, but they may also speak for someone who authorized them to be submitted, and the question now is as to whether or not the jury believes the testimony which would indicate, if believed, that the witness told Fong to submit information on submittal sheets, and Fong did.

Mr. Caner: Would you read the last question, if you will, please, Mr. Reporter?

(The question was read.)

Mr. St. Clair: I assume these conversations will carry [fol. 177] the same limitation your Honor ruled earlier.

The Court: Well, at the moment there is no showing that in connection with these matters the corporation had authorized Fong Foo to act. I am not saying it isn't coming in later, but I haven't heard it.

Mr. St. Clair: We can only move one step at a time, and I ask that it be limited.

The Court: It is so limited at the moment; there is nothing to show the corporation gave any such authority to Fong Foo.

Q. How frequently during the month of October did you have such conversations?

A. On some days it would probably be two or three times during the course of the day, and it took place practically daily for the month of October, and into November.

Q. And what was said in these conversations?

A. Fong Foo told me that a lot of material was ready.

The Court: Are those the words he used?

The Witness: Well, the exact wording I couldn't say.

The Court: Because quite obviously the word lot has a set of alternate meanings. A lot of material may be ready in the sense that a great deal of material may be ready, or a lot of material may be ready in the sense that a certain sample bulk is ready, to wit, a group of a defined number of 100 or 200.

Now, I can't tell from what you just said whether Fong [fol. 178] Foo said to you, "There is a large number ready" or whether he indicated a specific lot described as a lot was ready.

The Witness: No, there was no specific quantity tied to a lot at the time.

The Court: So you understood him to mean there was a vast number ready for inspection?

The Witness: Yes.

Q. Did he refer to any particular lot number as being ready for inspection?

A. Yes, it would be—

The Court: Not it would be. What did he say?

The Witness: He would say—

The Court: Not he would say. He did say.

The Witness: He said to me, "I have a lot of radiosondes, Lot number So-and-So, which is ready for your inspection."

The Court: Now, if I understand your testimony, it would indicate that every time Mr. Fong Foo told you that he had a lot ready for inspection, he told you of the specific lot number; is that your testimony?

The Witness: Not necessarily, sir.

The Court: Someti .es he gave you the lot number and sometimes he didn't?

The Witness: Yes, sir.

[fol. 179] The Court: Is that your testimony?

The Witness: Yes, sir.

Q. And in cases where no specific lot number was given you, thereafter did you receive a submittal sheet?

A. Yes, sir.

Q. Did that contain a lot number upon it?
A. Yes, sir.
[fol. 180] Q. Now after October how frequently did you have such conversations, October 1956?

Mr. Angoff: We are now going into a period of approximately two years. The question starting with "after" does not tie down the time in any respect.

The Court: First of all, we had better find out if he had any conversation after October. If he had none, it is tied down to zero.

Q. Did you have any conversations with Fong Foo after October on this subject?
A. Yes.
Q. How frequently did you have those conversations?
A. Oh, several times a week.

The Court: Does that mean for an extended number of weeks?
The Witness: Yes.
The Court: How many weeks?
The Witness: Oh, I would say approximately for the course of the two contracts, which is about two years.
Mr. Caner: That completes the direct examination of Mr. Palliotto, your Honor, at this time.
The Court: As I understand it you are going to call him again, but that is the conclusion of the direct examination with respect to the technical and the background testimony?
[fol. 181] Mr. Caner: Yes, your Honor.

Cross examination.

By Mr. St. Clair:

Q. Mr. Palliotto, how old are you?
A. 43.
Q. Are you a Civil Service employee?
A. Yes, sir.
Q. Do you have a rating so-called?
A. Yes.
Q. What is it?
A. GS-9.

Q. GS-9?
A. Yes.
Q. What was it in October of 1956?
A. GS-11.
Q. Which pay grade is the higher between GS11 and GS9?
A. Comparing the two pay grades—what I was getting, sir?

The Court: No. The jury does not know as well as the Court and you know that GS11 has a relationship of higher or lower to GS9. Now at all relevant times isn't GS11 either higher or lower than GS9?
The Witness: Yes, sir.
The Court: Which is it?
The Witness: The GS11 is higher.
The Court: So that you now hold a lower grade than you did before, is that correct?
[fol. 182] The Witness: Yes, sir.
The Court: All right. You would do very well not to fence with counsel, who know more about a court room than you do.
The Witness: Your Honor, the reason for that is that there is a change in my pay category, which has been reflected on it, and that is why I raised the question.

Q. Prior to October of 1956, which I understand was approximately the first time you came to the North Dighton plant, had you had any training in inspecting radiosondes as such?
A. Radiosondes? No.
Q. When did you first see a radiosonde?
A. I saw several.

The Court: No. That calls for a date.
The Witness: I couldn't give you the exact date. I did see one before.

Q. Where did you see it?
A. It was picked up by a civilian and turned over to us.

The Court: May I please again tell you that there is no "we" and no "us" in this court room. You are here as an individual. You are being asked: when did you person-

ally first see a radiosonde? If you cannot give a date no one would be surprised. You can at least describe the circumstances under which you personally first saw one, at what place, and who showed it to you, and the like.

[fol. 183] Q. Would you tell us where you were when you first saw a radiosonde?

A. Gorham Manufacturing Company, Providence, Rhode Island.

Q. What connection, if any, did you have with that concern?

A. I was the Quality Assurance Representative.

Q. Were they manufacturing radiosondes?

A. No, sir.

Q. What were the circumstances of your seeing a radiosonde at that place of business, if you know?

A. A civilian turned a radiosonde over to one of the Quality Assurance Representatives, and he brought it into the office and I saw it.

Q. Did you know at that time you were going to be assigned to a plant that was going to manufacture these instruments?

A. No, sir.

Q. Did you make a study of it at that time?

A. No, sir.

Q. You simply looked at it?

A. Yes, sir.

Q. You did not take it apart?

A. No, sir.

Q. So I take it you made no study of any actual radiosonde until you came to the defendant's plant some time in October of 1956?

A. Yes, sir.

[fol. 184] Q. When you came there had any radiosondes been manufactured as yet?

A. Yes, sir.

Q. How many?

A. I don't recall the amount now.

Q. Would there have been as many as one lot of 180 or so units?

A. There could have been.

Q. Do you remember?

The Court: We do not want what could have been. Almost anything in the world could have been.

Q. Do you remember?
A. I don't remember the quantity.
Q. In any event, did you inspect that quantity?
A. I don't quite understand.

The Court: The question is: did you inspect the first lot that was manufactured by the defendant, Standard Coil?
The Witness: I couldn't answer that.

Q. You mean you do not remember?
A. I couldn't answer because I don't know which lot they manufactured—
Q. Isn't Lot 1 the first one they manufactured?
A. That is the first lot presented to me.
Q. It was not the first lot presented to you?
[fol. 185] A. It is the first—no, the first lot presented to me is the only lot that I can vouch for. Previous to that—
Q. Which was that?
A. Lot No. 1.
Q. Was there any prior lot manufactured to your knowledge inspected by anybody else?
A. Yes.
Q. How many lots prior to the first one that you inspected?
A. That I do not know.
Q. Who inspected them, if you know?
A. Mr. Lewis of the Signal Corps.

The Court: Would you spell it? Is it L-e-w-i-s or L-o-u-i-s?
The Witness: L-e-w-i-s.

Q. What position did Mr. Lewis have at the North Dighton plant, if you know?
A. He was the Signal Equipment Support Agency Engineer on the radiosonde unit.
Q. What relationship did his job have to yours, if any?
A. We worked together.
Q. Is he your superior?
A. No.

Q. Are you his superior?

A. No.

Q. Did you have identical functions?

[fol. 186] A. No, sir.

Q. What were his functions?

A. His functions at that time were to check the unit submitted to him along with me and explain to me just what the defects were and to make any decision on any question I may have raised, which I did raise, on that unit as far as technical requirements only were concerned.

Q. He was your teacher, in other words? He was supposed to tell you about radiosondes, was he?

A. Yes, sir.

Q. How long did he spend with you instructing you in the art of inspecting radiosondes?

A. About one week.

Q. About one week. During that week—incidentally, can you identify the week, by date, or approximately?

A. Approximately the last week in September.

Q. During that week could you approximate the number of hours he spent instructing you?

A. No, sir.

Q. You cannot help us at all in that regard?

A. Well, I wouldn't say 40 full hours.

Q. You wouldn't say a full 40 hours?

A. No, sir.

Q. Would you say five hours?

A. Yes, sir.

[fol. 187] Q. Thank you. So that you had prior to the time you took over inspecting radiosondes approximately five hours' instruction from a Mr. Lewis, is that correct?

A. I would say more than that, sir.

Q. Now you say more. How much more?

A. I don't recall how many days I spent at the plant during that first week.

Q. Had there been some units manufactured by that time?

A. Yes.

Q. Had they been submitted to the Government for formal inspection?

A. That I don't know, sir.

Q. Well, think about it now. Was Mr. Lewis acting in the capacity also as a Government inspector as well as your teacher?

A. Yes.

Q. Is it your memory then he was inspecting these units while he was teaching you and determining whether or not they would be accepted by the Government?

A. I don't quite follow that.

Q. It is a very involved question. I will withdraw it. Is it your memory then he was acting as a Government inspector at the time he was teaching you?

A. He was not a Government inspector at that time.

Q. So he was not inspecting these units to determine [fol. 188] whether or not they should be accepted, was he?

A. He was.

The Court: Well, now just a moment. What was your title at that time?

The Witness: Quality Assurance Representative.

The Court: What agency of the Government employed you?

The Witness: The United States Army Signal Supply Agency.

The Court: You were then a civilian employee?

The Witness: Yes, sir.

The Court: What was Mr. Lewis?

The Witness: He was an engineer of the Signal Equipment Support Agency.

The Court: Is that a different agency from the one you were associated with?

The Witness: It is still our association.

The Court: The same one. Did he have any credentials or duties in connection with inspection?

The Witness: I saw credentials.

The Court: In connection with inspection?

The Witness: Yes.

The Court: You saw he had credentials which related to inspecting for quality goods supplied under contract to the Signal Corps?

[fol. 189] The Witness: Yes.

Q. These units were submitted, were they not, in some form of writing?

A. I don't quite get it.

Q. The units Mr. Lewis was inspecting, as you say, for the Government, were submitted in some form of writing?

A. That I don't know.

Q. Do you have the records that would pertain to the inspection you say Mr. Lewis was doing in late September or early October of 1956?

A. No, sir.

Q. Who would have those records, if you know?

A. Mr. Lewis.

Q. You mean the records that he made are carried along with him?

A. Yes, sir.

Q. And not left with your office at the plant?

A. No, sir.

Q. You still say that he was conducting an inspection on behalf of the Government?

A. Yes, sir.

Q. Was there any writing that you know of given to the company indicating acceptance by the Government signed by Mr. Lewis?

A. Do you want to repeat that question?

[fol. 190] (Question read.)

A. During the course of the contract, yes.

Q. No. You are quite right. We will come to that in a minute. But during this period when you say that he was the Government inspector, inspecting units and instructing you at the same time—

The Court: In other words, in September.

Q. —in September of 1956, and perhaps early October?

A. I don't know of any.

Q. Thank you. Now the acceptance by the Government of the United States is a fairly formal act, is it not?

A. Yes.

Q. It is not likely to be evidenced by word of mouth, is it?

A. I didn't hear the word.

Mr. St. Clair: Would you read the question?

The Court: It is not likely to be evidenced by word of mouth, is it?

The Witness: No, sir.

Q. And so, if you do not know of any writing signed by Mr. Lewis during the period late September or early October, 1956, accepting these units by the United States Government, won't you agree with me it is quite likely he did not accept units for the Government?

Mr. Caner: Objection.

The Court: I think it is a perfectly fair question. I do [fol. 191] not know the value of these units. If I were to look at the contract I could find out.

Mr. St. Clair: $93.20.

The Court: I would think that it is a fair question.

The Witness: Can I have the question read?

(The question was read.)

A. Yes, sir.

Q. Thank you. So in fact you were the first Quality Assurance Representative representing the Signal Corps so-called to inspect radiosondes at the North Dighton plant?

A. Yes, sir.

Q. Prior to the embarkation on your duties you had had approximately five hours' inspection during a one week's period of time from Mr. Lewis, is that right?

Mr. Caner: Objection.

The Court: That isn't really quite right. He said he had five hours, but he never said approximately five hours. He said "as many hours as he was in the plant during that week"—not as many as 40 hours and not less than five hours, and which on the present testimony is vague.

Mr. Caner: He said "more than five hours."

The Court: I agree. One minute more than five hours would be more than five hours. We do not know whether it is much more than five hours or not. The testimony at the [fol. 192] moment is more than five hours and less than 40 hours.

Q. Did you keep any daily record of your activities?

A. Yes.

Q. Did you keep any daily record of your activities during the period when Mr. Lewis was instructing you in this matter?

A. Yes.
Q. Do you have that record here?
A. No, sir.
Q. Where is it?
A. I believe the records have gone, have been destroyed.
Q. Who destroyed them?
A. Myself.
Q. When?
A. The last—
Q. The last what?
A. The last year or so.
Q. The last year or so. Can you tell me more definitely when you destroyed the records?
A. No, I couldn't.

The Court: After the Indictment was returned in this case?
The Witness: No, sir. These are my personal records.
The Court: I didn't ask you that. The Indictment in this case was returned presumably in January, January 15, [fol. 193] 1960. Did you destroy them after that?
The Witness: No. Before that, sir.

Q. Did you have any minutes or notes with you of your activities when you testified before the Grand Jury?
A. Yes.
Q. Are these different notes than the notes you destroyed?
A. Yes.
Q. Did you keep two sets of notes?
A. No, sir.
Q. Well, what notes did you destroy?
A. My own personal notes of my time that I kept.
Q. You retained some other notes, is that right?
A. Yes.
Q. Did you keep these sets of notes contemporaneously, if you understand the word?
A. I don't understand the word.

Mr. St. Clair: I will withdraw the question.
The Court: As you would call it "spuriously", the spur of the moment?
The Witness: Yes.

Q. Did you keep two sets of notes at the same time?

A. No, sir.

Q. You kept one set of notes for one period of time and then at a later time kept another set?

A. No, sir.

[fol. 194] Q. Let us take a date. October 1, 1956. Do you have two notes of what you did on that date?

A. No.

Q. You have only one note?

A. I don't have any note.

Q. That one you destroyed?

A. Yes, sir.

Q. You destroyed these notes, as I understand it, after you knew of a charge of wrongdoing leveled against these defendants, didn't you?

A. No, sir.

Q. You destroyed them before that?

A. Yes.

Q. Is it your normal practice to destroy your notes?

Mr. Caner: Well, which notes do you refer to?

The Court: He knows perfectly well which ones he destroyed. The question is whether he destroyed them at some time after he knew that charges either had been or were likely to be made against these defendants. Did you?

The Witness: To properly answer the question I would have to know what notes, sir.

The Court: Well, don't you know what you destroyed?

The Witness: Yes.

The Court: That is what we are asking you about.

Q. You knew that the FBI made an investigation at some time, didn't you?

[fol. 195] A. Yes.

Q. It was after that you destroyed these notes, as I understand it. Is that right?

A. It could have been. I'm not positive.

The Court: Well, now you cannot say "it could have been." You are being asked a very important question. You are asked whether you destroyed the documents, or notes, after an FBI investigation to your knowledge had begun. Did you?

The Witness: No.

[fol. 196] Q. Did you destroy those notes on the instruction of anybody?

A. No, sir.

Q. You did it of your own free will and accord?

A. Yes, sir.

Q. Well, you mentioned at one time on direct examination that you had seen one of these units dropped. When did you see a unit dropped?

A. During my service in the Army.

Q. Not in any way in connection with your duties as a government inspector?

A. No, sir.

Q. And did you have anything to do with the operation of one of these units in the Army?

A. No, sir.

Q. Did you have anything to do with the maintenance or repair of one of these units in the Army?

A. No, sir.

Q. Did you have anything to do with one of these units in any manner in the Army?

A. No, sir.

Q. Your first experience with them other than seeing them dropped once was late September or early October of 1956?

A. Yes, sir.

The Court: I will take the recess now for ten minutes.

(Short recess.)

[fol. 197] Q. Prior to your assignment to the North Dighton plant of the Standard Coil, I understood you to say that you were at the Gorham Manufacturing Company, or a similar name?

A. Yes, sir.

Q. What was the product they manufactured that you were inspecting?

A. The Amtrack 24, amplifiers, high frequencies, radar components, various types of radar components, various castings used in transmission work, on board ship and so forth and so on; various radar gear used by the Air Force

in aircraft. And other items which I don't recall at the present time.

Q. You mentioned on your direct examination that in the period of approximately ten years you had been an inspector in approximately fifty plants, as I recall it.

A. Yes, sir.

Q. Is it fair to say that your principal experience during that period had been with wire and cable?

A. No, sir.

Q. What was your principal experience?

A. Various electronic equipment, receivers, radar equipment, various components for radar equipment, and radio equipment, various signal equipment.

Q. Did you do any wire and cable inspection at all?

A. Yes, sir.

Q. Where was the last place you did that?

[fol. 198] A. The Royal Electric.

Q. I am sorry, but my question was a little imprecise. Where was the last place you did that prior to October of 1956?

A. General Insulating Wire Works, Providence, Rhode Island.

Q. You are now a wire and cable inspector at Royal, right?

A. Part time.

Q. Incidentally, are these units still being used, if you know? Is the radiosonde, as such, still being used?

A. I don't know, sir.

Q. Don't you know they are obsolete?

Mr. Caner: I object, your Honor.

The Court: I don't really see what that has to do with the case.

Mr. St. Clair: I will withdraw the question.

Q. The question has arisen as to the cost—and of course it is in the contract.

Mr. St. Clair: Can we agree it is $93.20 per unit?

Mr. Caner: No.

Mr. St. Clair: That is wrong?

Mr. Caner: That is wrong.

Mr. St. Clair: What is the correct figure?

Mr. Caner: There are two prices, one for the first contract and one for the second contract. One contract is somewhat more than $93 and less than $100. I don't remember the exact amount. But I don't think it is relevant in any [fol. 199] respect.

The Court: The question of whether you think it is relevant is not really the point, because it is in evidence.

Mr. St. Clair: Let's deal with it then on the basis of less than $100.

Q. The top part here of Exhibit 1 (indicating), which is the sample unit, which is a bronze colored plastic, consists of a parachute in its container?

A. Yes.

Q. And do you have an idea of the approximate cost of that?

The Court: Well, is that—?

Mr. St. Clair: I think it is.

The Court: Is that in the contract?

Mr. St. Clair: I don't think it is.

Mr. Caner: Yes, it is.

Q. Do you know the approximate cost?

A. No, sir.

Q. Is it $25—well, I will look it up at the noon recess.

These units had been manufactured by the defendant Standard Coil for some years prior to 1956, had they not?

A. I was told that, yes.

Q. And you had no reason to disbelieve it, did you?

A. No, sir.

Q. And they had been manufactured in a plant belonging to the defendant in California; is that right?

[fol. 200] A. I was led to believe so.

Q. You had no reason to disbelieve that, did you?

A. No, sir.

Q. And that some of the personnel, at least, in North Dighton had trained in manufacturing and calibrating these units in California?

A. That I do not know, sir.

Q. Well, in October of 1956 did you have occasion to observe some of the defendant's personnel?

A. Yes, sir.

Q. And did you have occasion to observe them in connection with the manufacture of these units and the calibrations thereof?

A. Yes, sir.

Q. Did you determine whether or not, from your observation, they seemed to be experienced?

Mr. Caner: I object.

The Court: I will allow that.

The Witness: I don't quite follow that question.

The Court: Well, I would say you are not an experienced witness from observation, and I would say other persons from my observation are experienced witnesses, and the question is whether or not the workers you saw around that plant who were engaged in preparing these instruments seemed to you to be experienced.

The Witness: I couldn't answer that question on the basis [fol. 201] of the time I was there.

Q. Did there come a time when you felt that the personnel manufacturing and calibrating these instruments were considered by you to be experienced?

A. I don't quite follow that question.

Mr. St. Clair: Will you read him the question, please?

(The question was read.)

The Witness: I would have to know in what category the answer is required.

The Court: Now, just a moment. If you were asked whether you thought the Clerk or the Reporter in this court were experienced, you would I think answer that they look to you as though they were experienced, wouldn't you?

The Witness: Yes, sir.

The Court: Now, what you are being asked is, was there a time when you thought that the people being employed by Standard Coil looked as though they were experienced?

The Witness: Yes, sir.

The Court: And when was that? In the beginning, or after you had been there a while?

The Witness: After I had been there a while.

Q. How long would you say, approximately?

A. About six months or so.

Q. Prior to that time, I take it you considered them to [fol. 202] be inexperienced in connection with the production and the calibration of these units?

A. No, sir.

Q. Well, as I understood you to say, there came a time approximately six months after you had been there that you came to the conclusion that the personnel manufacturing and calibrating these units were experienced; is that correct?

A. Yes, sir.

Q. I made the inference from that answer that prior to the six months period you must then have considered them inexperienced; is that wrong?

A. No, sir.

Q. That is right?

A. No, sir.

Q. Well, tell us then.

Mr. Caner: I object.

The Court: I think it is perfectly fair cross-examination, and the government's objection is overruled.

Q. Just tell us, then, did you consider during the first month you were there that the personnel manufacturing and calibrating these units were experienced in that process?

A. I considered it.

Q. And how did you consider it?

A. I don't quite follow the question.

The Court: Well, now, it isn't very difficult. From sit- [fol. 203] ting on the witness stand haven't you come to the conclusion as to whether some of the lawyers in this case are more experienced than others?

The Witness: Yes.

The Court: And don't you think you knew that some of them were experienced at the beginning of the case?

The Witness: Yes.

The Court: You are being asked the same kind of question about the people around that plant. Did you think

some of them were experienced from the very day you got there?

The Witness: I couldn't answer that.

The Court: What is difficult about it? You can answer it about lawyers, about whom you know much less.

The Witness: At that time, within a month, I couldn't judge who was experienced and who was not experienced, because I did not have enough time to concentrate on that radiosonde job.

The Court: How long have you been a witness in this case?

The Witness: Three days. Four days.

The Court: And you have had ample time to decide whether the lawyers are experienced?

The Witness: Yes.

The Court: Do you think it is easier to decide whether lawyers are experienced than whether an operator in a [fol. 204] plant is experienced?

The Witness: Yes, sir.

Q. Well, in any event, after approximately six months you came to the conclusion that at least some of the personnel calibrating and producing these units would qualify as experienced personnel; is that right?

A. Yes, sir.

Q. Would you put that same time limit on yourself as a government inspector of these units?

A. No, sir.

Q. How long would you say it took you to become an experienced government inspector performing the duties of a quality insurance representative on radiosondes?

A. Several months.

Q. How many is several?

A. It may be two months, or three months. I couldn't establish right now.

Q. Four months?

A. No, less than that.

Q. Less than four months, perhaps three months?

A. Possible.

Q. Possibly three months. All right. Now, during that time you were the head man on the premises, weren't you?

A. No, sir.

Q. For the first three months?

[fol. 205] The Court: Well, the head government man.

Mr. St. Clair: I am sorry. Thank you.

The Witness: Yes, sir.

Q. You were the quality insurance representative, you were it as far as the government was concerned, right?

A. Yes, sir.

Q. Mr. Lewis had gone, hadn't he?

A. He had gone the first time and had returned.

Q. Didn't some trouble develop in the government inspection?

A. No, sir.

Q. Mr. Lewis just came back periodically, say once a month; isn't that right?

A. No, sir.

Q. How long did he return after the first week in October of 1956, during the first three months?

A. There was periodic time intervals between his visits.

Q. Well, how often was this period?

A. Sometimes a month, sometimes four or five months.

Q. During the first three months.

The Court: Let me just tell you that periodic means occurring with regularity according to a period. Without being indelicate, I think you know the word period is used with human beings, and the same thing is true in other uses of the word. Now, a return isn't periodic if it isn't at regular intervals. Was there a periodic return by Mr. Lewis?

[fol. 206] The Witness: No, sir.

Q. During the first three months, October and November and December, of this period, how often did Mr. Lewis come to the plant?

A. I do not recall at the present time.

Q. Did he come at all?

A. I couldn't state whether he did or not. I would have to check the records.

Q. Well, in any event, if he did come, did he instruct you further in regard to inspecting these units?

A. I would have to know in relation to what instructing, sir.

Q. Did he teach you anything more about inspecting these units at any time following the first week that you told us about?

A. Yes, sir.

Q. When was the first time following that first week late in September of 1956 that he returned to instruct you further?

A. He did not return to instruct me further.

Q. I thought you just told me that he had given you further instructions.

A. He gave me further instructions, yes.

Q. But he didn't come up to do that?

A. No, sir.

Q. So that something occurred that led to his giving you further instructions; is that right?

A. No, sir.

[fol. 207] Q. Was it just a matter of accident that he gave you further instructions?

A. No, sir.

Q. Was there a need for it in your opinion?

A. No, sir.

Q. In other words, it was a gratuity that he offered you, that you didn't even feel was necessary or needed?

A. No, sir.

Q. In any event, he gave you further instructions?

A. No, sir.

The Court: What?

Q. Now, he didn't give you further instructions; is that right?

A. No, sir, he did not.

Q. Which is it? You just told us a few minutes ago he did give you further instructions. Now you tell us he did not. Just tell us what you did.

A. Mr. Lewis came up—

Q. Just tell us what you did.

A. What I did?

The Court: Did he give you further instructions, Yes or No? Think carefully of your answer and give us one word or the other. Did he give you further instructions?

The Witness: No, sir.

Q. Now, you had some assistants on the premises from time to time, did you not?

[fol. 208] A. Yes, sir.

Q. And you were their superior?

A. Yes, sir.

Q. And you were responsible for their conduct so far as the government was concerned?

A. Yes, sir.

Q. And you supervised their conduct, did you not?

A. Yes, sir.

Q. One of those you told us about was named Brown?

A. Yes, sir.

Q. There were others, weren't there?

A. Yes, sir.

Q. You didn't tell us about any others, did you, on direct examination?

A. No, sir.

Q. There was a Mr. Kowlaik; is that the correct name?

A. Yes.

Q. He was an assistant of yours, was he not?

A. He was a subordinate.

Q. Is there a difference in your mind between an assistant and a subordinate?

A. I don't know the exact definition.

Q. Well, he helped you?

A. Yes.

Q. And he helped you perform the duties of a quality in-

[fol. 209] surance representative, didn't he?

A. Yes.

Q. And he represented, to that extent at least, the government of the United States at this plant, did he not?

A. Yes.

Q. Now, to deviate for just a moment to something I overlooked, I think it is clear, but perhaps we should have it stated again. These units are used only once, are they not, in the normal course?

A. Yes.

Q. That is, they are not recoverable?

A. No, sir.

Q. They are dropped over areas that are not accessible, or at least easily accessible, and once they have been dropped to the ground that is the end of them in the normal course?

A. Yes, sir.

Q. Sometimes they are recaptured, however, is that right?

A. I don't know of any ones that have been.

Q. There is one of course at Gorham, that somebody got hold of, but other than that you don't know of any others?

A. That was a radiosonde AMT-4.

Q. Oh, different than this?

A. Yes.

Q. So when you said you had seen one before, you meant that you had seen something quite different?

[fol. 210] A. Yes, sir.

The Court: You saw a horse and buggy version of the present instrument?

The Witness: No, it is a small—

The Court: Well, an early model.

The Witness: Yes.

The Court: A Model T or something.

Q. In any event, a model not manufactured by the defendant Standard Coil?

A. Yes, sir.

The Court: Is that right?

The Witness: Yes, sir.

Q. It was manufactured by Standard Coil?

A. No, sir.

Mr. St. Clair: It was a poor question; I apologize.

Q. Now, did you instruct your assistants, Mr. Brown and Mr. Kowlaik and others?

A. Yes, sir.

Q. Well, let's start with Mr. Brown. When did he first come to the premises?

A. In February 1957.

Q. You had been there then about five months?

A. Yes, sir.

Q. He first came in February 1957? Are you reasonably certain of the date?

[fol. 211] A. It may have been. I think it was the 14th of February.

Q. Are you satisfied that it was February of 1957?

A. Yes.

The Court: You remember because of Valentine's Day, or some such reason?

The Witness: No, I don't remember exactly what date.

The Court: You said the 14th of February.

The Witness: I said I think it was the 14th of February.

The Court: Well, have you some reason for picking out the 14th day of February?

The Witness: No, sir.

Q. Well, now, Mr. Brown had actually been in the North Dighton plant from the time you first arrived, hadn't he?

A. Not at the time I was in the plant.

[fol. 212] The Court: Now just reflect very carefully. You got to the plant in September of 1956?

The Witness: Yes, sir.

The Court: Was Mr. Brown there then?

The Witness: No, sir.

Q. In any capacity?

A. No, sir.

Q. It is your testimony then that he came for the first time to North Dighton as a Government inspector in February of 1957?

A. To my knowledge, yes, sir.

Q. Do you have some doubt about it?

A. To my knowledge—

Q. You have some doubt about it?

The Court: Well, he can only have his own knowledge. He has doubt about what he knows, just like the rest of us can be doubtful about items.

Q. Are you certain he was not there as early as October of 1956 in some capacity?

A. No, sir.

Q. Did you have any assistant in October of 1956?

A. Yes, sir.
Q. Who was he?
A. Mr. Manugian.

The Court: Would you spell the name, please?
[fol. 213] The Witness: M-a-n-u-g-i-a-n.

Q. What, if any, responsibility did Mr. Manugian have with respect to radiosondes?
A. I don't recall now just exactly what position he worked at.
Q. Did he work on radiosondes?
A. He may possibly have.

The Court: Well, now, if you please, "may", "could", and other auxiliary verbs which suggest uncertainty are always unfortunate choices by a witness. I would rather you take time and think about it. Did he or did he not to your knowledge have anything to do with radiosondes?
The Witness: I couldn't state at the present time.
The Court: You say you do not know?
The Witness: I don't know.
The Court: Then don't say "may have". I might have been or could have, too. It so happens that I did not.
The Witness: Yes, your Honor.

Q. Did you have any other assistants in October of 1956?
A. I believe, yes, a Mr. Zubek.
Q. Would you spell that?
A. I'm sorry. I can't remember the spelling.

The Court: Roughly is it Z-u-b-e-k?
The Witness: Yes, sir.

Q. Did he have any responsibility for testing radiosondes?
A. I don't remember at the present time.
[fol. 214] A. Did you have any other assistant in October of 1956?
A. I don't recall.
Q. Well, now, when you test radiosondes it is necessary that a representative of the Government be present on the floor while it is tested?
A. No, sir.

The Court: I do not even understand that question. It isn't the law of nature that makes it necessary. It may be some other kind of law I haven't heard about.

Q. Is it a rule under which your employment as Quality Assurance Representative—strike it out.

The Court: All right.

Q. Can you tell us during October of 1956 when radiosondes were being tested by the Government if there was a representative of the Government available on the test floor?

A. Yes.

Mr. Caner: If the Court please, I think the word "available"—

Mr. St. Clair: Present on the test floor then.

The Witness: Would you mind repeating the question?

Mr. St. Clair: And use the word "present" instead of "available".

(The question was read.)

A. Yes.

The Court: Was that a repetition? When they were be-[fol. 215] ing tested by the Government was there a Government representative there?

Mr. St. Clair: Perhaps. But in any event—

The Court: Maybe you can explain it.

Q. I take it then, as far as you can remember, you were the man standing there while these units were being tested?

A. No, sir.

Q. Who else other than yourself would be standing there while the units were being tested in October of 1956?

A. The Standard Coil Products personnel.

Q. These inexperienced personnel you told us about?

Mr. Caner: I object, your Honor. He didn't testify they were inexperienced.

Mr. St. Clair: For some six months.

The Court: Do you want "not experienced"?

Mr. Caner: He testified he didn't have any opinion whether they were.

The Court: I am afraid that is not my recollection of the testimony. The objection is overruled.

Q. Do you mean to have us understand that being the Quality Assurance Representative at this plant you had these units tested by inexperienced personnel without any Government representative being present?

A. No, sir.

Q. Then what was the situation with respect to the pres- [fol. 216] ence or lack of presence of a Government representative in October of 1956?

A. Mr. Fong Foo during my first visit to the plant and—

The Court: I can see that you are not going to answer the question, because that is not responsive. Would you read the question, Mr. Duffey?

(The question was read.)

The Court: I don't think it is a very good question anyway.

Mr. St. Clair: It isn't. I will withdraw it.

Q. Do you want us to understand then that at some point, or at some time during October of 1956, Government tests were being conducted at this plant, and there was no Government representative present?

A. No, sir.

Q. There was always a Government representative present, wasn't there?

A. Yes, sir.

Q. Thank you. Who was it, if it wasn't you, that was present on each occasion in October of 1956?

A. I would have to know what place, what position on the floor.

Q. At any place on the floor where these units were being tested.

A. On the floor where these units were being tested, [fol. 217] there would be times I would have no one.

Q. There would be no one there, is that right?

A. No, sir.

The Court: That is correct, you mean?

The Witness: Yes, sir.

Q. So that as the Quality Assurance Representative you want us to understand that in October of 1956 some Government tests were permitted by you without any representative of the Government present, and of course being conducted by inexperienced personnel? Is that the way you want to leave it?

Mr. Caner: Well, if the Court please, the word "present" is capable of many meanings. The witness has pointed this out by saying, "What does he mean? Present on the floor, or present by the test position, or present in the plant?" I think the question has to be more confined. And I also repeat my objection that I do not believe the testimony was that Standard Coil personnel were inexperienced.

The Court: First of all, I overrule the objection. Second, I don't think it is desirable for you to repeat an objection in a form like that after the Court has made its ruling, and repeat it in the presence of the jury under circumstances where the jury might misconstrue your view as an attempt to overrule the Judge. I will allow the question.

[fol. 218] Mr. St. Clair: Would you read the question?

(The question was read.)

A. No, sir.

Q. You have prepared here as an exhibit—

The Court: I don't know whether he prepared it. An Exhibit was introduced by the Government.

Mr. St. Clair: I wish I could find the number, if your Honor please.

Mr. Mitchell: It is Exhibit 4.

Mr. St. Clair: Thank you.

Q. Are you familiar with Exhibit 4?

A. Yes, sir.

Q. This purports to show in rather rough sketch the floor, the production and test floor utilized in making radiosondes, does it not?

A. Yes, sir.

Q. So that it is absolutely clear, do I understand that in October of 1956 the Government tests were performed on occasion without a representative of the Government present at any place on this floor, as shown on Exhibit 4?

A. No, sir.

Q. There was always a Government representative present some place on the floor, shown in Exhibit 4?

A. Yes, sir.

Q. There are no dimensions on Exhibit 4, but perhaps [fol. 219] you can help us. First of all, it shows an arrow on the lower left-hand corner pointing to the bottom of the Exhibit entitled "To Signal Corps Office". I take it that is your office?

A. Yes, sir.

Q. Approximately how far away was that?

A. From what position, sir, on the chart?

Q. From the bottom of the chart.

A. Roughly around 200 feet.

Q. And from the Radiosonde Assembly Line?

A. 250 feet.

Q. How far is it, would you say, from the Temperature Control Station, which is shown on Exhibit 4 in the second line, the second unit in from the left entitled Temperature Control Station, how far is it from that station to the Temperature Zero Set, which is indicated as No. 2 on Exhibit 4?

A. About 8 feet.

Q. 8 feet from here to here, and "here" being the two points I have just identified?

A. Yes, sir.

Q. How far is it from the Temperature Control Station I have just identified to the Pressure Calibration Station, which is designated No. 5 on Exhibit 4?

A. I can't see it from here.

Mr. St. Clair: May he step down?

The Court: Yes, of course.

[fol. 220] (The witness leaves the witness stand and goes to the chart on the blackboard.)

The Witness: Would you read the question?

(The question was read.)

A. That would be about 10 to 12 feet.

Q. About 10 to 12 feet. How far from the Temperature Zero Set, which is designated No. 2 on Exhibit 4, is it over to Station No. 14, identified as Final Operation Station Signal Corps?

A. Between 40 and 50 feet.

Q. And how far is it from Station No. 14, as shown on Exhibit 4, to Station No. 15, identified by the word "shock", as shown on Exhibit No. 4?

A. About 30 or 40 feet.

Q. Is there a location on Exhibit 4 that a Government representative would normally be stationed at when Government tests were being conducted?

A. There are several positions.

Q. Would you indicate them for us, please, and designate them as closely as you can with this pointer, and for the record?

A. Possibly here (indicating).

Q. Not "possibly". What is your best memory as to where the Government representatives were stationed during Government tests of radiosondes in the usual course of business?

[fol. 221] A. I was standing in this position here at times (indicating).

Mr. St. Clair: The witness has indicated with the pointer a position adjacent to the Numeral 12 in the uppermost line of equipment on Exhibit 4 at about the words "Multihead Recorder", is that right?

A. Yes.

Q. Thank you. That is your normal station, is that right?

A. No, sir.

Q. You told us you would be stationed there?

A. Yes, sir.

Q. Did you have a normal station?

A. No, sir.

Q. You were there on occasion?

A. Yes, sir.

Q. Every day?

A. No, sir.

Q. Every month?

A. No, sir.

Q. More than once a month?

A. Yes, sir.

Q. Once a week?

A. I couldn't answer that exactly.

Q. More than once a week?

A. At times, yes.

Q. Did you come on the radiosonde floor every day?

[fol. 222] A. Yes.

Q. At some time?

A. Yes.

Q. You were there on many days more than once, weren't you?

A. Yes, sir.

Q. When you were there, I take it, you normally took the position you just identified near Station No. 12 on Exhibit 4, is that right?

A. No, sir.

Q. You would wander around?

A. Yes, sir.

Q. All right. Show us the other stations that you or other personnel normally would take during the Government tests on Exhibit 4, please.

A. In the vicinity of the Temperature Control Station.

Q. When you say "in the vicinity" how far away?

A. Anywhere from one foot to ten feet.

Q. The Temperature Control Stations are located on the second line from the top, two instruments in from the left, is that right?

A. Yes.

Q. You or others representing the Government would be stationed at that point one foot to ten feet behind the operator, is that right?

A. Yes, sir.

[fol. 223] Q. Any other places that representatives of the Government would normally be stationed at?

A. At position 13 called Humidity Chamber, in the vicinity of that chamber.

Q. How far away from position 13?

A. Anywhere from one foot to ten feet.

Q. That again is with reference to the symbol indicating the Operator on Station No. 13?

A. Yes, sir.

Mr. St. Clair: For the record, Station 13 appears in the top line of Exhibit 4 about a little more than halfway across the Exhibit, from the left, reading to the right.

Q. Any other locations that Government personnel would be stationed at during the conduct of the Government tests?

A. Yes, sir.

Q. What is the next one?

A. In the area not shown on the chart.

Q. Where is that?

A. That would be in the Motor Manufacture, Servo Lines, Inch and a Half Motor Lines, Camera Control Manufacturing Lines.

Q. These have to do with radiosondes?

A. No, sir.

Q. Well, all right. It is my error. Would you limit your answer to radiosondes, since that is what we are principally [fol. 224] interested in at the moment. Have you told us all the locations now that Government personnel normally are stationed at during the conduct of Government tests of radiosondes?

A. No, sir.

Q. Tell us what the other stations were.

A. Position 14, Final Operational Station Signal Corps.

Q. The "Sig. C" stands for Signal Corps?

A. Yes, sir.

Q. That is Station 14 appearing in the second line of equipment down from the top on Exhibit 4, is that right?

A. Yes, sir.

Q. With reference to Station 14, how far away would the Government representative be stationed?

A. He would be stationed anywhere from two to four feet from Position 14.

Q. Any other stations?

A. Yes, sir. Position 15.

Q. 15 is designated by the word Shock?

A. Yes.

Q. On the right-hand, near the right-hand margin of Exhibit 4?

A. Yes.

Q. About how far away from Station 15 would the Government representative be stationed?

[fol. 225] A. I would stand anywhere from five to 20 feet from that station.

Q. Would anybody else stand there to your knowledge representing the Government?

A. Yes.

Q. Who?

A. Mr. Harry Brown.

Mr. Caner: Could we have the period to which that question has reference?

Mr. St. Clair: Yes.

Q. Mr. Caner would like to know the period that Mr. Brown stood at Station 15 and observed shock tests?

A. After February, 1956.

Q. Do you mean 1957?

A. 1957, and up to February of 1958.

Q. Were there any other stations Government representatives normally were stationed at during the conduct of Government tests on radiosondes?

A. Would you define the word "normal" to me, please?

Q. In the usual course of business.

A. Yes, sir.

Q. What other stations?

A. The Hydrogen Station, which is in this corner here (indicating).

Q. Any other place?

[fol. 226] A. In the Mechanical Visual Position, Electrical Position, at Position 1.

Q. Position 1 is the third line down from the top, near the left-hand margin of Exhibit 4, is that correct?

A. Yes, sir.

Q. A Government representative would be standing there while the Government tests were being conducted in the usual course of business?

A. No, sir.

Q. I am only asking where Government personnel would be stationed at in the usual course of business. Do I understand now that no Government representative would normally be stationed at Station No. 1?

A. No, sir.

Q. I understand that there would normally be a Government representative stationed at Station 1?

A. Yes, sir.

Q. Thank you. Any other stations?

A. I do not recall at the present time.

Q. During the period from, let us say, during the month of October, 1956, other than yourself what representatives manned these several stations you have now designated in the normal course of business?

A. Mr. Zubek and Mr.—

The Court: Mr. whom?

[fol. 227] The Witness: Mr. Zubek and Mr. Manugian.

Q. This refreshes your recollection, I take it, then that Mr. Manugian and Mr. Zubek performed Governmental inspection on radiosondes during October of 1956?

A. That I couldn't—

The Court: What?

The Witness: I couldn't properly answer that, sir.

The Court: Well, didn't you just about a minute ago say that they did perform such functions, and didn't you about 20 minutes ago say that you didn't know whether they tested radiosondes? I wonder whether you appreciate the importance of consistent testimony.

The Witness: No, sir.

The Court: I'm sure you don't.

The Witness: The problem, sir, I would like to explain, is that we had four or five various lines going at once, and my inspectors were moving around quite often during the day, and I couldn't positively tell you who was sitting where at one time.

The Court: Nobody will think that you are unusual if you have lapses of memory and do not recall every detail. There is nobody in the court room who can remember perfectly what happened in September and October of 1956. I have no question whatsoever that everybody in this court [fol. 228] room was in September or October of 1956 in the company of somebody whose name he has forgotten and whose appearance he has forgotten. There is nothing extraordinary about your not remembering people. But what is extraordinary is that at one moment you say you don't know, and the next moment you say something about these people, and then when the contradiction is pointed out you say that you can't tell us. All that I am trying to say to you

is that before you state anything affirmatively without qualification under oath be sure that you are prepared to stand on it.

The Witness: Yes, sir.

Q. You may resume your seat, Mr. Palliotto. Did you instruct Mr. Manugian and Mr. Zubek in the art of inspecting for the Government these radiosondes?

A. Yes.

Q. To your knowledge had they had any prior experience in inspecting radiosondes before they came to North Dighton?

A. To my knowledge I wouldn't know.

Q. Did you form an opinion in the course of your instructing these two gentlemen as to whether or not they had had any previous experience in inspecting radiosondes?

A. No, sir.

The Court: You didn't form an opinion?

The Witness: No, sir.

Q. So you cannot now tell us whether or not you thought [fol. 229] either of these men were experienced as you were teaching them how to properly inspect radiosondes?

The Court: I just can't believe you mean the previous answer, that you didn't form an opinion. You told us that after three days in this court room you formed an opinion as to whether the lawyers were experienced, didn't you?

The Witness: Yes, sir.

The Court: Do you mean to say that after days of working with associates in connection with inspection of radiosondes you did not form an opinion—I don't say what it was—but you didn't form an opinion whether they were experienced?

The Witness: As far as some phases of it, yes; other phases, no. He is pointing out the radiosonde itself. That is a broad subject. As far as inspection is concerned—

The Court: You formed an opinion whether the Clerk is experienced?

The Witness: Yes, sir.

The Court: He performs a great many functions, many more than I think you have the slightest idea of.

Q. Did you think that they were experienced in inspecting these radiosondes in every detail?

A. No, sir

Q. There were some details, however, that you felt they [fol. 230] were experienced in?

A. Yes, sir.

Q. That is they had had similar equipment inspected by them on previous occasions?

A. Yes, sir.

Q. In any event, in the area in which you felt they were inexperienced, you were charged with the responsibility of instructing them?

A. Yes, sir.

Q. And you undertook the responsibility?

A. Yes, sir.

Q. Just as you have been instructing us in the past few days. I will take that back. Then Mr. Brown came in February of 1957, is that right?

A. Yes, sir.

Q. I take it that you instructed him as to how to properly inspect radiosondes?

A. Yes, sir.

Q. Did he replace either of the two gentlemen you have already named, Zubek and Manugian?

A. I don't recall the reason for Mr. Brown being there or—

The Court: Now don't go off on a tangent. Did he replace either of them? Yes or no?

The Witness: I couldn't say at the present time.

Q. In February, when Mr. Brown came, did you have [fol. 231] three assistants then?

A. At times, yes.

Q. Please understand me. I am principally interested in radiosondes. Did you have three assistants that had anything to do with radiosondes, commencing with Mr. Brown's arrival, you say, in February of 1957?

A. I don't recall.

Q. You don't recall Could you have had four?

A. I don't recall.

Q. Ten?

A. No, sir.

Q. Something less than ten?

A. Yes, sir.

Q. All of whom were responsible to you?

A. Yes, sir.

Q. You were responsible for their education, so to speak, and their duties with respect to the radiosondes?

A. No, sir.

Q. Who was responsible for their education in those duties if you were not?

A. There were some other duties where the office, our agency is responsible.

The Court: Well, now wait a minute. I should have thought you have been here long enough and that it would be clear that responsibility and duties are personal. There [fol. 232] are not agencies that are responsible. There are human beings that are responsible. There is no escape from duty by making it corporate. Now will you please tell us who has the individual responsibility if you didn't?

The Witness: I don't quite follow the question.

The Court: Well, I tried to point out to you that you cannot say an organization has the responsibility. For the purposes of a criminal lawsuit, such as this, you have got to tell us who is responsible, not what is responsible. Is that clear?

The Witness: Yes, sir.

The Court: Now you were being asked about situations in which you personally were not responsible and you are being asked who under those circumstances carried the responsibility.

The Witness: Do you mind repeating the last question?

(The question was read.)

[fol. 233] The Witness: Would you mind repeating that last question?

The Court: All right, read Mr. St. Clair's question.

(The question was read.)

The Court: Point to the man or men.

The Witness: Mr. Leo Shapiro.

Q. Who was Mr. Shapiro?

A. Chief of the Eastern Regional Branch of the Signal Supply Agency.

Q. And where was his office located? In Philadelphia?

A. In Philadelphia.

Q. You mean to suggest that these men should have gone to Philadelphia?

A. They may have.

The Court: No, no. I know it is difficult to be a witness, but I have told you not to use "may have." Did they go to Philadelphia?

The Witness: I do not know, sir.

Q. Well, you know they didn't, don't you?

A. I do not know.

The Court: Well, I realize you don't know whether I went to Philadelphia last night or not, do you?

The Witness: No, sir.

The Court: You know I was here yesterday at one o'clock, don't you?

[fol. 234] The Witness: Yes, sir.

The Court: You know I was here today at ten o'clock, don't you?

The Witness: Yes, sir.

The Court: Even though you haven't watched me between one o'clock and ten o'clock, you know there was a hurricane in between, don't you?

The Witness: Yes, sir.

The Court: And you know there is no way in a hurricane of getting very quickly to Philadelphia and back?

The Witness: Yes, sir.

The Court: Don't you think you could testify I wasn't in Philadelphia last night?

The Witness: Yes, sir.

The Court: Do you think you can testify about these men?

(Discussion off the record.)

Q. Mr. Shapiro is your boss, isn't he?

A. Yes, sir.

Q. And he is the boss of quite a few government inspectors, or was your boss and also the boss of quite a few government inspectors similar to you?

A. Yes, sir.

Q. And you really mean to suggest to us that you thought these men, who were subordinate to you, called on Mr. [fol. 235] Shapiro at his office in Philadelphia and received instructions on how to test the radiosonde?

A. No, sir.

Q. Thank you. Now, it takes a little know-how to properly test a radiosonde, doesn't it?

A. Yes, sir.

Q. That is, Mr. Caner and myself are not likely to be very good inspectors?

The Court: I don't know about that. I think by what has been so far shown you might be.

Mr. Angoff: Even I.

Q. Let's say a person can't walk in off the street and take up his duties of inspecting radiosondes and be expected to do it very well, can he?

A. No, sir.

Q. And you were the one that had the responsibility of instructing your assistants in how properly to inspect?

A. Yes, sir.

Q. And you undertook that responsibility, did you not?

A. Yes, sir.

Q. And the instruction they obtained was obtained from you, if any?

A. Some, yes, sir.

The Court: Well, where else did they get it from, that you saw?

[fol. 236] The Witness: Specifications, sir.

The Court: That isn't what I thought instructions was, in the sense in which it was being used by Mr. St. Clair. Did any other individuals instruct them?

The Witness: I don't know, to my knowledge.

The Court: In other words, you testified that while you were there all the time, only you gave oral instructions; is that right?

The Witness: Yes, sir.

Q. Now, as a quality insurance representative you were responsible for these government tests, were you not?

A. Yes, sir.

Q. You were responsible to see that they were conducted properly, were you not?

A. Yes, sir.

Q. And you were responsible to see that the specifications were followed?

A. Yes, sir.

Q. And if you saw anyone deviate from those, you were supposed to instruct them as to how properly to do it?

A. The question, the last part, is too broad.

Q. You answer it, whether or not you think it is too broad.

A. I couldn't answer that question.

Q. Well, if you saw someone perform some duty other than the conduct of a government test, you were respon- [fol. 237] sible to see that that conduct was changed, weren't you?

A. Yes, sir.

Q. You were in charge of the government test, weren't you, you and your assistants?

A. Yes, sir.

Q. Referring again, then, to Exhibit 4, you spent considerable time, I think, on the first day of your direct examination—can you see this at all, sir?

A. Yes, sir.

Mr. St. Clair: Perhaps we can move it around (doing so).

The Court: Go right down there and look at it. (Witness complied.) As a matter of fact, I can't understand why the witness could not have another copy of that.

Mr. St. Clair: I thought he did.

The Witness: I do have a copy.

Q. Would you rather use this one or use your own copy?

A. I can use my copy.

Q. All right, use your copy. (Witness returns to the witness stand.)

On the first day of your testimony, and perhaps part of the second day, you explained in considerable detail the process whereby a radiosonde is manufactured, and in particular calibrated; do you recall your testimony?

A. Yes.

[fol. 238] Q. Now, the manufacture of a radiosonde is a company function, is it not?

A. Yes.

Q. And that commences generally on Exhibit 4 on the so-called radiosonde assembly line shown across Exhibit 4 and in the center thereof, isn't that right?

A. Yes.

Q. And the various parts of the radiosonde are put together on those assembly lines; is that right?

A. Yes.

Q. Now, you as a government representative—and by you I include your assistants—have no primary responsibility with respect to the production of the radiosonde unit, do you?

A. Would you mind rephrasing that question?

Q. Perhaps you should have it reread—all right, it will be quicker; do you have any primary responsibility with respect to the production of these units?

A. No, sir.

Q. That is a company function, so to speak?

A. Yes, sir.

Q. Now, the thing that is manufactured is the unit a sample of which has been marked 1-A that I hold in my hand, isn't it?

A. Yes, sir.

Q. After that is manufactured it is put in a case and a parachute is attached and then the unit looks as Exhibit 1 [fol. 239] appears; isn't that right?

A. Yes, sir.

Q. But the principal manufacturing function performed by the company is shown here in Exhibit 1-A?

A. Yes, sir.

Mr. St. Clair (showing to Jury): I am sure you are all familiar with this. This is the item that was being manufactured.

Q. And that area in Exhibit 4 is known as the radiosonde assembly line; is that right?

A. Yes, sir.

Q. Now, after the unit shown as Exhibit 1-A is fully assembled, then it is "calibrated," isn't it?

A. Yes.

Q. I think it has already appeared that the use of the word calibrate is probably inaccurate. It is really adjusted, isn't it?

The Court: Is it? I didn't so understand the testimony. I thought calibrated was correctly used, that is to say, bringing into relationship of one scale and another scale.

(Discussion off the record.)

Q. Let's say the unit is calibrated; that is the term that is used in any event, isn't it?

A. Yes, sir.

Q. In the process of calibration—and incidentally, this calibration is a company function, again, isn't it?

[fol. 240] A. Yes, sir.

Q. The first thing that is done is to zero set the unit; is that right?

A. Yes, sir.

Q. And the first zero set put on the unit is the temperature zero set?

A. Yes, sir.

Q. And that is performed at Station No. 2 as shown on Exhibit 4, near the left-hand margin?

A. Yes, sir.

Q. Now, so that we fully understand what zero setting is, let's describe it a little bit. What happens is this, a unit similar to Exhibit 1-A is placed on a table, through which there is a small hole; is that right?

A. Yes, sir.

Q. And through that small hole is blown some air of a predetermined temperature; is that right?

A. Yes, sir.

Q. And that is supposed to be at least 30 degrees centigrade; is that right?

A. Yes, sir.

Q. And if that is exactly 30 degrees centigrade, then this unit is adjusted so that it will send out a predetermined Morse Code group, to wit, SX; isn't that right?

A. Yes, sir.

[fol. 241] Q. So that by zero setting the unit, really a reference point is established?

The Court: Brought into relation with a scale.

Mr. St. Clair: That is right, sir.

Q. Reference on a scale is established?

A. Yes, sir.

Q. And for purposes of convenience, I believe, the temperature of 30 degrees centigrade was selected, and the code group SX; is that right?

A. Yes, sir.

Q. Now, at that point there would be no motive for anyone to misadjust a zero set, would there?

A. I would not be in a position to determine.

The Court: Well, can you think of any motive, except a motive to be wicked and arbitrary and cause trouble and lawsuits?

The Witness: No, sir.

Q. If you mis-set a zero set, you are only asking for trouble, aren't you?

A. Yes, sir.

Q. So there is no reason for anybody to knowingly or willfully misadjust a zero set, is there?

A. No, sir.

Q. Now, after the temperature zero set is set, then in connection with the company function of calibration it is [fol. 242] then taken to Station 3, is it not, shown on the top line of Exhibit 4?

A. Yes, sir.

Q. And that reads, Temperature chamber capacity 6 units production?

A. Yes, sir.

Q. The word production signifies that at this station there is a company function being performed, does it not?

A. Yes.

Q. And a calibration, so called, is made on the unit at that point for temperature, isn't it?

A. Yes.

Q. The unit is placed in the temperature chamber and

then the temperature in the chamber is controlled, is it not?

A. Yes.

Q. And it is controlled at several distinct points, is it not?

A. Yes.

Q. The first point being minus 50 degrees centigrade, is it not?

A. Yes.

Q. Now, these machines are not fine laboratory instruments, are they?

A. I am in no position to judge that.

Q. Well,they are used only once, right?

A. Yes.

Q. They cost, I think, as Mr. Caner suggested, something [fol. 243] less than $100 including the parachute; is that right?

A. Yes.

Q. And you now can't tell us whether or not they are fine laboratory instruments?

A. I don't quite follow that question.

The Court: Well, they are not examples of the highest precision manufacture with which you are familiar, are they?

The Witness: No.

Q. Now, they are put into this chamber, and the chamber is reduced to minus 50 degrees centigrade; is that right?

A. Yes.

Q. Does the chamber have a dial on it?

A. Yes.

Q. Does it have a thermometer on it showing a column of either mercury or colored alcohol?

A. At times.

The Court: When it is finished it has, hasn't it?

Mr. St. Clair: The chamber, your Honor, this chamber here indicated as 3 on Exhibit 4—well, I can put it another way quicker.

Q. How is the temperature indicated on the chamber designated 3, used by the company in the initial calibration?

A. By an electronic bridge.

Q. Called a thermoster?

[fol. 244] A. Thermoster and the various controls associated with it.

Q. And that is all shown on a gauge with a needle on it?

A. Part of it with a needle on it, and a part of it in another chamber.

Q. With respect to Chamber 3 only, please.

A. I couldn't say for sure.

Q. You are not quite familiar, then, with what machinery the company uses in its function in the manufacture and calibration of these units; is that right?

A. Yes, sir.

Q. It is your understanding, I take it, though, that the calibration is designed so that the company can ascertain which code groove will be produced by the machine at minus 50 degrees centigrade?

A. Yes.

Q. And that is the function of the calibration, that is performed at the Station 3?

A. Yes.

Q. And again there is no motive that anyone would have to misstate that initial calibration?

A. I do not know of any.

Q. Now, actually there is a considerable tolerance allowed, is there not, in connection with these calibrations?

A. I couldn't answer that question.

The Court: Well, that is nothing but a summary method [fol. 245] of stating what the specifications, whatever they are called, 2E or 3F, state; isn't that right?

The Witness: No, he is talking about production now. And production may have different standards than the government has.

The Court: I thought you were talking about tolerance in performance.

Mr. St. Clair: I am talking now about the production and calibration, which is a company function and not a government function.

Q. Do you know whether or not there were any tolerances provided in the calibration performed by the company, before the units are submitted to the government for testing?

A. No, sir.

Q. You are not familiar with that?

A. No, sir.

Q. That wasn't part of your duty, in any event?

A. No, sir.

Q. Now, you do know that if it had been calibrated at several points commencing with minus 50 degrees centigrade, and minus, is it, 30 degrees centigrade, next?

A. Plus 30 degrees centigrade.

Q. Well, you mean in the initial calibration it is only minus 50 degrees centigrade and then plus 30 degrees?

A. Yes, sir.

[fol. 246] Q. That is all that is done in the initial calibration, so far as you know?

A. Yes, sir.

Q. Now, as soon as the code groove is determined by minus 50 degrees centigrade, a chart is selected, is it not?

A. Yes, sir.

Q. And a chart similar to Government's Exhibit 6 which has been reproduced in a blown up form, which I am now holding up; is that correct?

A. No, sir.

Q. Not similar to this?

A. No, sir.

Q. Well, with respect to Government's Exhibit 6, you observe, as I do, on the right-hand upper corner, after the word "initial" the figures 58 and the letters GN. If you know, what do the letters GN signify?

A. The code letter for the minus 50 degrees centigrade point.

Q. Now, you know, do you not, that the company had prepared in advance at least fourteen different charts representing fourteen different minus 50 degree code groups; is that right?

A. I know they had prepared some. The exact quantity, I couldn't state.

Q. Would you disagree if I were to suggest there were at least fourteen?

A. No, I would not.

[fol. 247] Q. So that this particular one, Exhibit 6, is known as a GN chart, is it not?

A. Yes.

Q. And that means that is a GN chart at minus 50 degrees centigrade; when the company calibrated the machine it read GN, as I am reading now on Government's Exhibit 6; is that correct?

A. Yes.

Q. And the company, as a result of this calibration, would then select, in this instance that we are now using as a hypothetical, a GN calibration chart for the particular machine being calibrated; is that right?

A. No, sir.

Q. Well, let's suppose a machine that is 50 degrees centigrade when the company was calibrating it read KL in Morse Code, what would happen in the right-hand corner of that calibration chart?

A. KL.

Q. And that would identify that machine as a machine that would initially calibrate minus 50 degrees centigrade by sending out a code KL; is that right?

A. Yes, sir.

Q. And there were a number of such charts prepared by the company in advance of calibration of the units manufactured by it, were there not?

A. Yes, sir.

[fol. 248] Q. And you don't disagree with my suggestion that there were at least fourteen such charts?

A. I couldn't state the exact number.

Q. Well, in the event that a machine would read a code for which there had been no chart prepared, what would happen then, if you know?

A. The control personnel would compute the chart based on our observation of the minus 50 degrees centigrade level.

Q. So that there were fourteen charts already prepared, and any number of charts were possible, depending on what any particular machine would produce by way of a code signal at minus 50 degrees centigrade; is that right?

A. Would you—?

Q. It is very long and involved, and I am sorry.

The Court: You would prepare a chart to correspond with the actual signal?

The Witness: Yes.

Q. And supposing the machine on its initial calibration by the contractor, as you call the company, produced minus 50 degrees at code letters DP, and there was no chart already prepared in advance for such a machine, as I understand it, then, it is your understanding that the company would then prepare a separate sheet for that machine calibrated on the basis of minus 50 degrees, reading DP?

[fol. 249] Q. Well, supposing, according to your understanding again in the production of these units and in their calibration by the contractor, a machine in its calibration in minus 50 degrees Centigrade did produce the code letters DP, and there was no chart preprepared for that event, what would you say the contractor would do?

A. He may possibly prepare a chart or he may reject that particular unit.

The Court: The contractor would?

The Witness: Standard Coil Products, Incorporated.

Q. This was a function performed by the contractor, was it not?

A. Yes, sir.

The Court: To me that answer is extraordinary. As I understand it, you say that the contractor could prepare a new chart? Is that one of the alternatives?

The Witness: Yes, sir.

The Court: You also said that the contractor, not the Government, could reject the instrument?

The Witness: Yes, sir.

The Court: Did you so testify?

The Witness: Yes, sir. He is at the present time talking about his production, and we haven't got into the Government's inspection yet.

The Court: I understand that. Could you explain to [fol. 250] me the reason why somebody would take a $93 instrument and throw it away, if he so decides or make a chart?

The Witness: If the characteristics indicated the temperature was falling within certain groups of letters and you had the spurious units—

The Court: What kind of units?

The Witness: Spray—

The Court: If you want to call them spurious most of us will understand that to mean false or fraudulent or some other way not genuine. You use spurious in a way which I can only say has added to my vocabulary for evening entertainment but not in any way in my daytime knowledge.

Q. Well, in any event, the company had the alternative of either throwing away, as his Honor suggested, the $93 instrument, or making up a new chart. Is that right?

A. I didn't say "throw away."

Q. Well—

The Court: Reject?

The Witness: Reject.

The Court: The word "reject" means throw back.

The Witness: Yes.

Q. Were there occasions on which they made no new charts?

A. Yes.

Q. Thank you.

The Court: I am going to recess now until 2:15.

(Recess.)

[fol. 251] AFTERNOON SESSION

The Court: Ladies and gentlemen, I told you I was going to have to sit tomorrow with Chief Judge Woodbury and Judge Sweeney in a case and I am told that Chief Judge Woodbury for some reason has canceled that so this case will be on tomorrow morning at 10:00 o'clock as usual.

Mr. Caner: If the Court please, we told the witnesses—

The Court: You can send a message now. You have between now and 10:00 o'clock tomorrow morning. Unless they are out of town.

Mr. Caner: They are, in a sense. Fall River.

The Court: That's terribly far. Send them a telegram right now that they have got to be here at 10:00 o'clock.

CONSTANZ PALLIOTTO, Resumed

Cross examination.

By Mr. St. Clair, Continued:

Q. Mr. Palliotto, we were discussing, prior to the noon recess, the process of calibration that the contractor or company engaged in after it had manufactured the unit and I believe that we had completed our discussions with respect to the temperature calibration, but, just so that there will be some connecting link, as I understand it the temperature calibration was made by the contractor at [fol. 252] minus 50 degrees Centigrade and at plus 30 degrees Centigrade; is that correct?

A. Yes.

Mr. St. Clair: At those two points. Mr. Foreman, ladies and gentlemen of the jury—

The Court: You can just put it down here.

Mr. St. Clair: I can, but then your Honor can't see it. Can that be seen by—I had made reference prior to the noon recess to this figure GN in this corner up here and indicating a chart in which minus 30 degrees Centigrade would read GN on the chart as an indication of a particular unit to assist the contractor in picking out among the several calibration charts, as related to temperature. The GN in the right-hand corner of Exhibit 6 corresponds with the code group GN opposite minus 50 degrees Centigrade.

Q. Again this was a function of the contractor; that is, this is a job the contractor had to do prior to your submission of the unit to the Government for test; is that correct?

A. Yes.

Q. From then, the temperature calibration that you have described—we next go to the pressure calibration; is that right?

A. Yes, sir.

Q. The pressure calibration took place at Station No. 5 on Exhibit No. 4, is that correct?

[fol. 253] A. No, sir.

Q. Well, Station No. 5 reads, "Pressure Calibration Station Production"?

A. Yes, sir, but Position No. 4, you have your first step.

Q. I haven't come to Position No. 4. I simply asked you, sir, if pressure calibration was not done at Station No. 5?

A. Yes, sir.

Q. And that is again the word "-Prod." which means "production, does it not?

A. Yes, sir.

[fol. 254] Mr. St. Clair: Mr. Foreman and Ladies and Gentlemen, if you will look at this position, you will see after the words pressure calibration station the hyphenated word prod. meaning production.

Q. And that indicates again, does it not, that this is one of the contractor's functions to calibrate the radiosonde for pressure?

A. Yes, sir.

Q. And the calibration itself is done at Station 5?

A. Yes, sir.

Q. As shown here on Exhibit 4. Now, prior to calibration, again the unit had to be zero set, did it not?

A. Yes, sir.

Q. And that is done by the company, or the contractor?

A. Yes.

Q. And that was done at Station 4, immediately adjacent and to the left of Station 5 on Exhibit 4; is that right?

A. Yes.

Q. Now, in pressure zero setting, again an arbitrary pressure is chosen, is that right? 990 millibars?

A. Yes, sir.

Q. That was the standard that was chosen?

A. Yes, sir.

Q. And that was an arbitrary figure?

A. Yes, sir.

[fol. 255] Q. And the units were placed in a chamber at

a pressure zero set station, which chamber was supposed to be at 990 millibars of pressure; is that right?

A. Approximately.

Q. That is, we are dealing now in an area of tolerances, in other words?

A. Yes, sir.

Q. You try to get it as close as you can, but of course there is bound to be some error?

A. Yes, sir.

Q. So that we are dealing only in approximate figures, but approximately 990 millibars was applied to each of the machines in the pressure zero set chamber?

A. Yes, sir.

Q. And then each machine was adjusted so that it would read a certain set Morse Code?

A. Yes, sir.

Q. And the Morse Code was what?

A. WB.

Q. And that was true of each and every radiosonde that was manufactured?

A. Yes, sir.

Q. So that immediately after the calibration for 900 millibars, approximately, each machine should have sent out the code group WB?

[fol. 256] A. Yes, sir.

Q. That is the so-called zero set that puts all the machines on an even par to begin with; they all start out the same, in other words?

A. Yes, sir.

Q. Then we move to the next step which is the calibration step so-called?

A. Yes, sir.

Q. And here they are put in a separate and distinct chamber, are they not?

A. Yes.

Q. And that is the chamber appearing as Station 5 on Exhibit 4 I just indicated; is that right?

A. Yes.

Q. Then the units are placed in that chamber, and the pressure in that chamber is adjusted to various levels, is it not?

A. Yes.

Q. What was the first level of the pressure that the calibration chamber was reduced to?

A. Approximately 150 millibars.

Q. That means that in the chamber there was less air pressure than in the outside atmosphere?

A. Yes, sir.

Q. And when the chamber was reduced to approximately that number of millibars, a code reading was observed on the machine; is that right?

[fol. 257] A. Yes, sir.

Q. And now we had calibration charts all prepared for various readings of pressure, did we not?

A. Yes, sir.

Q. Do you know how many calibration charts for pressure had been pre-prepared?

A. The last figure I had was around 200.

Q. Around 200 had already been prepared for various pressure readings at 150 millibars; is that right?

A. Yes, sir.

Q. What calibration points in the production and calibration were used, if you know?

A. To the best of my knowledge, 150, 350, 550, 750, 950, and 990.

Q. Now, again [illegible] was not a function that was under your direct supervision, was it?

A. No, sir.

Q. That was the company calibrating its own instruments prior to their submission to you for test?

A. Yes, sir.

Q. And you say that the company had some 200 calibration charts made up in order to cover all of the possibilities that might occur on any machine as it was being calibrated for pressure?

[fol. 258] A. Yes, sir.

Q. So that if we may use Exhibit 6 as simply an example—

Mr. St. Clair: If your Honor please, you have indicated you are reasonably familiar with it, and if I may put it on this table?

The Court: You may.

Q. And will you please step down over here, Mr. Witness?

(The witness complied.)

Q. On that sample, Government's Exhibit 6, what was the code group for 150 millibars?

A. The letters BW.

Q. BW, as indicated over on the left-hand margin under the column headed Pressure 150, correct?

A. Yes, sir.

Q. So that if a machine had exhibited the characteristic of sending out a signal BW at 150 millibars, then this chart, everything else being equal, would have been selected by the contractor to accompany the machine as it is submitted to the government?

A. No, sir.

Q. What would determine the selection of the calibration chart for a machine that did read BW when submitted to 150 millibars of pressure?

A. To select the chart, you would require readings at various other levels to establish the trend of the unit.

[fol. 259] Q. In other words, you would not rely, that is, the company did not rely on the 150 millibar level solely to determine which chart to take; is that correct?

A. That is right.

Q. It would only be after comparing the chart at the 150 millibar level and at the other levels you have already designated, would the operator know which chart to select?

A. The operator in charge of the charts, yes.

Q. And there were some 200 charts from which the pressure could be selected; is that right?

A. Yes, sir.

Q. And there would be some 200 such charts for each temperature chart, would there not?

A. I don't quite follow that.

[fol. 260] Q. That's a very difficult one but let's see if we can follow it. Government's Exhibit No. 6 is sometimes called the GN sheet, is it not?

A. Yes.

Q. That is, it is indicated in the upper right-hand corner, the letters GN?

A. Yes.

Q. Which indicates, of course, the minus 50 degrees Centigrade; correct?

A. Yes.

Q. Now, in addition to temperature the Government's Exhibit No. 6 has certain pressure information as well, does it not?

A. Yes.

Q. And you said there were about 200 different charts for pressure?

A. Yes.

Q. That would be, there would be 200 charts for pressure for the GN charts for temperature; right?

A. That I couldn't say for sure.

Q. Well, is that your best understanding?

A. Yes, because they do not have all the combinations possible.

Q. How many combinations do they have?

A. I am not in a position to know that particular thing.

Q. Several hundred when you are all through; right?

[fol. 261] A. Possible.

Q. Isn't that so?

A. Yes.

Q. At least you do not disagree with me when I suggest there were at least 14 temperature charts; is that correct?

A. I would have to know what stage of the contract. The first contract we were up in one range of code and the second contract we started overlapping to another range so therefore we established more charts.

Q. Let's take the minimum number.

The Court: Without any question, several hundred charts.

Q. There would be several hundred charts from which you would have to choose in order to calibrate any single instrument?

A. Yes.

The Court: That isn't really right. You mean several hundred charts would be necessary for a factor which

turned out in the number in which each instrument was fully calibrated.

Mr. St. Clair: Let's see if I can do that just once more—

The Court: I think the jury understands any one instrument needs only one chart but you decide which chart is right. Each person needs one pair of shoes and the shoe [fol. 262] store has to have a number of different kinds because there are a number of different size customers.

Q. Is that about the way it is?

A. Yes, sir.

Q. When a customer walks out of the store he has on one pair of shoes?

A. Yes.

Q. But in the process of selection there may have been several hundred pairs of shoes considered by the salesman?

A. Yes, sir.

The Court: In a ladies' store, several thousand.

(Laughter.)

Q. On each chart there are many, many entries for both temperature and pressure, on each one of the several hundred charts?

A. Yes, sir.

Q. So we are really dealing in a possibility running into thousands of numbers?

The Court: It is like different widths, lengths and color. If you have to satisfy a customer with respect to shoes you have to have a great variety of shoes.

The Witness: Yes.

Q. After the various pressure levels have been read and the machine has been calibrated, someone selects the appropriate chart; is that right?

[fol. 263] A. Yes.

Q. And at this point I take it circumstances did arise from time to time when there would be no chart on hand that would fit the machine for pressure?

A. No prepared chart.

The Court: Sometimes there isn't a shoe in the store that's just right. Isn't that really the same situation?

The Witness: Yes.

Q. Under those circumstances then someone would go out and make a shoe to fit, so to speak?

A. Yes.

Q. And so the actual number that is possible is really unlimited?

The Court: Well, not strictly, but a very high number.

Q. A very high number; is that right, Mr. Palliotto?

A. Yes.

Q. Now, from the pressure calibration process the machine was then taken to the humidity calibration and zero set stations, was it not?

A. Yes, sir.

Q. Now, at the humidity station—may I first identify the station on Exhibit No. 4—is that Station No. 6 entitled Humidity Zero Set?

[fol. 264] A. Yes, sir.

Q. And that appears about in the middle of the top line of Exhibit No. 4; right?

A. Yes, sir.

Q. Now, at the humidity zero set the unit is placed in a chamber, is it not?

A. After the hair element is placed on the unit.

Q. You mean as a part of the humidity calibration the hair elements are placed on it?

A. Yes, at this stage.

Q. Everything else up to this point had been done but the hair elements had not been placed on it?

A. Yes.

Q. The hair elements were being conditioned, so to speak, in a chamber, were they not?

A. Yes.

Q. At 80 degrees Centigrade and 90 per cent humidity?

A. To the best of my knowledge, yes.

Q. Again this isn't subject to your direct knowledge but that is the best of your knowledge?

A. Yes.

Q. And that chamber was located where?

A. In Position E which is the top row, the fifth chamber in.

Mr. St. Clair: The witness, if your Honor please, and members of the jury, is indicating Humidity Conditioning [fol. 265] Chamber E as I am indicating on Exhibit No. 4.

Q. That chamber contained numerous hair elements you have already described on your direct examination; correct?

A. Yes.

Q. That chamber was automatically controlled, was it not?

A. Yes.

Q. Nobody pushed any buttons or turned any dials, that was an automatically controlled chamber?

A. No, it had to be adjusted.

Q. When it got out of adjustment?

A. Yes.

The Court: Every so-called automatic device is subject to adjustment.

Q. When it got out of adjustment it had to be adjusted; is that right?

A. Yes.

Q. These control chambers did get out of adjustment from time to time?

A. Yes.

The Court: Like thermostats and refrigerators; correct?

The Witness: Yes.

Q. And they had to be fixed from time to time?

A. Yes.

Q. And adjustments had to be made in the machines to [fol. 266] compensate for the errors in the chambers from time to time?

A. I don't quite follow that question.

Mr. St. Clair: Will you read it, please?

(The reporter complies.)

A. (Continued) I don't quite follow what you mean by "machines."

Q. Adjustments had to be made in the radiosonde to reflect the errors in the machines from time to time; isn't that right?

A. No.

Q. No. Never?

A. Not to my knowledge. The equipment was supposed to be calibrated—

The Court: Wait a minute. This is before delivery to you or submission to you. Isn't that what you meant?

Mr. St. Clair: Yes.

The Witness: Then I am not aware of that step the contractor used.

Q. All right, that's fair enough. Now, these hair elements had been conditioned, so to speak, in the chamber designated as E on Exhibit No. 4 for a period of at least six hours; is that right?

A. I couldn't swear to that.

Q. Well, is that your understanding of the process?

A. It is my understanding.

[fol. 267] Q. And then they were taken out at the time that the humidity zero set was to be performed by the contractor and placed on the unit; right?

A. Yes.

Q. And then were they placed in another chamber?

A. Yes.

Q. What other chamber were they then placed in?

A. Position No. 6, humidity zero set.

Q. As shown on Exhibit No. 4, I am now indicating Position No. 6. That consisted of a chamber, did it?

A. Yes.

Q. What were the conditions supposed to be in the chamber?

A. I don't recall right now what the conditions were supposed to be.

Q. What was the zero set figure for humidity?

A. That was set at the 90 per cent humidity level.

Q. Isn't, then, that the figure that was supposed to be in the zero set chamber?

A. Yes.

Q. 90 per cent humidity; right?

A. Yes.

Q. And, again, the machines would read a certain code group at 90 per cent, wouldn't they?

A. Yes.

Q. And let's make reference now to Government Ex-
[fol. 268] hibit No. 6 again. Can you see it from there? If you don't mind, step down.

A. (Complying).

Q. Would you tell us what figure 90 per cent humidity was—the signal that was sent out in this hypothetical machine covered by Government's Exhibit No. 6?

A. The code letters NA.

Q. I indicate on this chart code letters NA and the figure 90 per cent relative humidity under the appropriate column, relative humidity percentage. And every machine was supposed to record NA at 90 per cent?

A. Yes.

Q. So again they all start out even so far as the humidity is concerned. "Even" is not a good word. They all start out alike as far as humidity is concerned; is that right?

A. Yes. (Returning to the witness stand)

Q. With respect to humidity may I ask you this: this was not a very stable element of the machine, was it?

A. I can't answer that on yes or no.

Q. All right. Do you know whether or not, when the machine reaches the field and shortly before its use, it is required that the machine be re zero set by the personnel about to use it?

A. I am not too familiar with the field requirements at the present time.

[fol. 269] The Court: Isn't it self-evident that something which depends on 36 strands of what you people called virgin women's hair isn't very stable? I am not talking about the stability of virginity, but about the hair.

The Witness: He asked if they adjusted it in the field and I couldn't swear to it.

[fol. 270] Q. What is your best knowledge with respect to that?

The Court: Don't you really know, doesn't everybody who has any familiarity at all with the subject know, that hair is a less stable element than other elements which enter into this Exhibit 1?

The Witness: I would be required to use the word possible, which your Honor does not—

The Court: Well, it is a little more than possible, isn't it? Don't you know that anything that is composed of human elements such as hair has a smaller degree of stability than something which is a simple chemical element?

The Witness: Yes.

Q. You indicated on your direct examination that they were having trouble with this kind of hair and you described they were looking for a substitute kind.

The Court: Not a substitute kind of hair. A substitute for hair.

Mr. St. Clair: That is right.

The Witness: That was not my statement.

Q. I am sorry, I thought I heard you say that. Well, never mind. In any event, they were taken out of the zero set chamber after they had been set to read NA?

A. Yes.

Q. Then where were they next taken?

A. They were taken over to position 7.

[fol. 271] Q. Position 7 appears—?

A. Approximately the center of the second row.

Q. In the approximate center of the second row on Exhibit 4; is that right?

A. Yes.

Q. Was there any additional calibration for humidity beyond the zero set?

A. No, sir.

The Court: There never was at the time it reached you?

The Witness: No.

The Court: So that if the zero set was right, everything was right?

The Witness: Yes.

Q. Or at least that was the assumption, right?

A. To the best of my knowledge it was.

Q. After they were taken from the humidity zero set, they were then taken to Station 7?

A. Yes.

Q. And a mechanical application was applied at that point?

A. Yes.

Q. Have we completed now all of the steps of calibration that the company went through prior to submitting the units to you for the government's inspection?

A. To the best of my knowledge.

[fol. 272] Q. How long would it take in the normal course of events to completely calibrate a unit from temperature zero set on the position 2 through the various steps down through the humidity zero set at Station 6?

A. The exact time I couldn't say, sir.

Q. Approximately?

A. I couldn't approximate, sir.

Q. A day?

A. I couldn't. You have variables there.

Q. Now, let's suppose for the moment that a unit has been zero set for humidity; at the end of the day, is the unit allowed to remain out in the open air, in the open room, all night, during the production and the calibration stage?

A. Yes.

Q. Does this have any effect, or did this have any effect, on the accuracy of the humidity zero set, if you know?

A. The question is vague.

The Court: I don't think any woman on the jury would have the least doubt about it. You couldn't tell me that hair remains in the same condition when it is out of the chamber as when it is in the chamber?

The Witness: No, sir.

Q. Wasn't there a cabinet in which the units were stored awaiting further, either testing, or examination, or further processing?

A. You will have to state whether you are talking about [fol. 273] production units or government's samples.

Q. Let's limit the question at the moment to production samples before they have been submitted to the government for inspection?

A. That I don't recall, sir.

Q. What is the process, then, that takes place at number 7, Gliptol, and also remove shorting bars? What is done at that stage?

A. At that stage the operator takes the unit, removes the wire that is soldered across the relay by cutting it with a pair of pliers, and he applies Gliptol, which is a sealing material, to prevent the screws from loosening up on the pick-up arms, and on the humidity zero set-screw, and on the nut holding the record or the disc, and applies oil to the motor.

Q. Those set-screws you referred to, I take it, are the screws which were adjusted in the various zero sets?

A. No, sir, one is the screw, the humidity set-screw.

Q. That is the only one?

A. That is the old one that was Gliptol-ed.

Q. Then from there it went to the final operation station contractor, designated as 8 on Exhibit 4?

A. Yes.

Q. And the contractor, of course, refers to the defendant Standard Coil?

A. Yes, sir.

Q. And that is the station at which Standard Coil put [fol. 274] the machine through its final operation test, so to speak?

A. Yes, sir.

Q. Then it is all ready to be submitted to the government; is that right? (A pause.)

Q. In the normal course?

A. Yes, sir.

Q. So that as a matter of fact, at that point we can draw a line right down through here and say to the left of the line and up to this point the company or the contractor has had the primary responsibility for producing and calibrating the machine; is that right?

A. Yes, sir.

Q. And to the right of the line, then the government takes over to test this machine; isn't that right?

A. Yes, sir.

Q. And the machines are submitted in writing, so called, in a rather formal manner, in the form we have had much discussion about so far?

A. Yes, sir.

Q. What else with the machine is submitted to the government at that point by way of documents?

The Court: You mean 13 to 18?

Mr. St. Clair: There may be some others.

The Witness: At the first lots, just the submittal sheet. After about seven to eight lots, we had a list of serial num-
[fol. 275] bers of units submitted with the transmittal sheet.

Q. Is that the sheet that was at one point attached to a submittal sheet?

A. Yes, containing a list of numbers.

Q. Which you designated as the government work sheet?

A. I did not.

The Court: Somebody else did.

Q. Are you sure you didn't designate that as the government work sheet?

A. I had a list of serial numbers attached to my form when I was describing it.

Q. In any event, nothing was filled in on that sheet that was attached to the submittal sheet?

A. A list of serial numbers was on there.

Q. Other than that, nothing?

A. No, not that particular one.

The Court: Just so that we won't have any misunderstanding, are you talking about Exhibit 18?

Mr. St. Clair: I think it was withdrawn on his statement that it was the government work sheet, if your Honor please, at the end of the first day.

The Court: That is old Exhibit 10, no longer called Exhibit 10. Is that the one you mean?

Mr. St. Clair: My memory is that annexed to it was another piece of paper which was withdrawn as part of
[fol. 276] Exhibit 10 because it was identified by the witness as the government work sheet, so to speak.

The Court: All right.

Q. Now, were there any other documents submitted to the government with these units, beyond the submission sheet, and after a period of time a list of serial numbers?

A. Yes.

Q. What other documents?

A. The calibration charts for each unit represented in the lot.

Q. After they had been selected out of these many hundreds of possibilities; is that right?

A. Yes.

Q. And were they handed to you in a group, or were they accompanying each machine?

A. They were handed to me in a group.

The Court: I don't even understand that question. You mean were sheets for many different machines handed to you at once?

Q. Can you help us on that?

A. You are asking the questions. I don't know what you are—

The Court: All right, that is good enough. The question is whether or not a number of different sheets for a number of different machines were given to you at once or were you given sheets for one particular machine at a time?

The Witness: No, sir, I was given a group of calibra-
[fol. 277] tion charts at one time.

The Court: For a number of different machines?

The Witness: Yes.

Q. Actually, the machines were submitted to you in so-called lots, were they not?

A. Yes.

Q. And each lot was designated by a number, was it not?

A. Yes.

Q. And it varied in quantity say from 180 units up to 200 units?

A. Yes.

Q. And each sheet for each machine in each lot was handed to you, so to speak?

A. Yes.

Q. Now, in addition to the calibration charts, the submission sheet for the lot, and at a later time a list of serial numbers, were there any other documents given to you, or your assistants, may I add, with respect to these machines upon their submission to the government for inspection?

A. Yes.

Q. Now, what other documents were given to you or your assistants?

A. Submittal sheets for various other tests required on these units.

Q. Do we have examples of those in evidence?

A. That I don't recall.

[fol. 278] The Court: Well, do you recall any type of submission sheet or submittal sheet of which we have no specimen?

The Witness: No.

Q. Well, let's take Exhibit 10, which purports to be a submittal sheet signed by Mr. Sawyer for Lot 89. Now, what test or tests did that represent a submission for?

A. The sheet shows electric test, a type of inspection on electric.

Q. There is a place on Exhibit 10 under the heading Type of Inspection, which contains four subdivisions, the first visual-mechanical.

A. Yes.

Q. Electrical?

A. Yes.

Q. Packing and packaging?

A. Yes.

Q. And the word "Other" for the fourth one?

A. Yes.

Q. And then there is a little space for someone to check?

A. Yes.

Q. Would that check or designation of type of inspection be made by a government representative or a representative of the contractor?

A. Representative of Standard Coil Products.

Q. The contractor?

[fol. 279] A. Yes, sir.

Mr. St. Clair: Now, Mr. Foreman and Ladies and Gentlemen, the witness has indicated on Exhibit 10, which is the submission sheet so-called—

The Court: By the way, that is now being offered?

Mr. St. Clair: It is marked as Exhibit 10. I am not talking about the annexation to it.

The Court: Well, according to the Clerk's notes, it is all struck.

Mr. St. Clair: Well, let's get this one in.

The Court: The yellow sheet is admitted, if you don't want the white one.

Mr. St. Clair: At the moment, let's keep only the yellow one.

The Court: All right, Exhibit 10-A is the white one.

Mr. St. Clair: The witness, Mr. Foreman and Members of the Jury, has described this portion of what is now marked Exhibit 10 under the heading Type of Inspection, visual-mechanical, electrical, after which there is a check mark, packing and packaging, and other.

[fol. 280] Q. Now, what type or what description of type of inspection would cover the inspection for temperature, pressure and humidity, of these four possibilities?

A. My description?

Q. No, of the four possibilities appearing on Exhibit 10, what would cover the test for temperature, pressure, and humidity?

A. The fourth block shown as Other, with the notation of what the test was.

Q. What would the notation consist of, if this particular submission was for that kind of test?

A. Ambient type test or type test.

Q. T-y-p-e, type?

A. Yes.

Q. In other words, these tests that were conducted for the government for temperature, pressure and humidity were called type tests, were they not?

The Court: Well, there are two kinds of type tests, are there not, from your earlier testimony?

The Witness: I don't recall.

The Court: You said there were ambient tests and another kind?

The Witness: Ambient and cold.

The Court: Yes.

The Witness: Well, that is still part of the test to check [fol. 281] the calibration of the unit.

The Court: Well, ambient has to do with the surround-

ing atmosphere at the time, without any artificial lowering of temperature.

The Witness: Yes, sir.

Q. What designation on Exhibit 10, under the heading Type of Inspection would cover the shock test?

A. The word shock would be put in there, or underneath.

Q. After the word Other, in other words?

A. Yes.

Q. So that the tests for temperature, pressure, humidity and shock would fall under the designation Other; is that right?

A. Yes.

Q. Were these units submitted—we have already established they were submitted in lots—were they submitted for the temperature, pressure, humidity and shock tests one at a time?

The Court: One machine at a time or one test at a time?

Mr. St. Clair: One test at a time.

Q. Or were they submitted for all four tests together?

A. You will have to specify the tests so I can answer that properly.

Q. We are talking now about pressure, humidity, temperature and shock test, and let's assume we are dealing again with Lot 1.

The Court: Were the shoes examined for length, width, [fol. 282] color, height, all at once, or did you first look at it to determine its length? Do you understand my example?

The Witness: I don't quite follow you.

The Court: All right, you had better do it your own way.

Q. Take Lot 1, for example. Lot 1 was submitted to you for inspection on a submission form, was it not?

A. Yes.

Q. Was that submitted to you for temperature test alone?

A. No, sir.

Q. In other words, then, it was submitted to you for temperature, pressure, humidity, and shock test?

A. I would have to look at the sheet again.

Q. Well, in the usual course of business how was it done?

A. It changed. At the beginning it was one method, and then it altered as the contracts went along.

Q. What was the original method?

A. To the best of my knowledge, the original method was temperature, pressure, humidity, and shock test.

Q. All at one time?

A. Yes.

Q. That is, the company in substance said, "Here, Mr. Government, here are the machines, you test them for temperature, pressure, humidity and shock"; right?

The Court: Did the shoe fit?

[fol. 283] The Witness: Yes.

Q. There was a change, you say, in this procedure at a later time?

A. Yes.

Q. First of all, when did the first such change take place in the procedure?

A. I can't recall at the present time.

Q. Approximately?

A. During the period between May and July 1957.

Q. And tell me, what was the change that was instituted during that period in this proceeding?

A. The shock test was changed to where I did it after the final operation station.

[fol. 284] Q. Whose final operation station?

A. After my final operation.

Q. After your final operation?

A. Yes.

Q. What was the status of the machines after you had finished your temperature, pressure and humidity tests but before the shock test? In whose control were they?

A. (Brief pause.)

The Court: Well, for what purpose? Obviously title hadn't passed and possession is really only for a particular purpose and you are asking—this is really a very difficult one. I couldn't answer it—

Q. Were the machines ever returned to the contractor after the initial submission?

A. Yes.

Q. Initially?

The Court: You mean if they were rejected or if they weren't rejected?

Mr. St. Clair: It is a complicated question. I will withdraw it.

Q. Let's assume for the moment a lot that passed muster, so to speak.

The Court: No rejects in it.

Q. (Continued) Not enough rejects to disqualify the lot. Or let's assume one with no rejects. It was initially sub-
[fol. 285] mitted to you on a written form; correct?

A. Yes.

Q. For testing for temperature, pressure, humidity and shock test?

A. Yes.

Q. After the shock test was that lot given back to the contractor or was it accepted by the Government?

A. There were several lots that were accepted by me after the shock test.

Q. I am talking about a lot, now, that passed muster. There were no rejects.

The Court: If a lot was entirely satisfactory was it ever handed back, in whole or in part, to Standard Coil or any of its representatives?

The Witness: If the lot passed all requirements we accepted it for shipment.

The Court: In other words, the answer is it was never turned back to the company?

The Witness: No, sir.

The Court: You mean it was never turned back to the company?

The Witness: Yes, sir.

Q. It was accepted by the Government; right?

A. Yes, sir.

Q. During the period of time after its submission these [fol. 286] machines were in your control, were they not?

A. Yes, sir.

Q. You have referred to them on your direct examination as "my macnines," is that right?

A. The—yes, sir.

Q. They were segregated on the floor, were they not?

A. Yes, sir.

Q. In separate racks; is that right?

A. Yes, sir.

Q. And no one was supposed to touch them unless they were under your control or supervision; isn't that right?

A. Yes, sir.

Q. And those racks are represented on Exhibit No. 4 by the racks designated No. 9 in the second row near the right-hand margin of Exhibit No. 4, are they not?

A. Yes, sir.

The Court: Is this a good place for the afternoon recess?

Mr. St. Clair: Yes, sir.

The Court: Ten minute recess.

(Brief recess.)

Q. After a lot is submitted to you, Mr. Palliotto, and to you I mean, of course, you or your assistants, a random selection of units to be tested is made; isn't that right?

A. Yes.

[fol. 287] Q. Who makes that selection?

A. At the—

The Court: Who?

The Witness: In October, 1956, during that period I did and it also changed during that period.

Q. When did it change?

A. During the period of October—

The Court: Now what is the antecedent of "it"? It hasn't any, has it?

Mr. St. Clair: Let me start again. Maybe I can make it clear.

Q. You didn't, of course, test each and every unit in each lot submitted, did you?

A. No, sir.

Q. You would select a number of units out of each lot for testing, wouldn't you?

A. Yes, sir.

Q. And initially you made the selection yourself?

A. Yes.

Q. By "initially" I mean commencing October, 1956?

A. Yes, sir.

Q. Are you telling us that at some later date someone else selected the units to be tested by the Government other than yourself?

A. No, sir.

[fol. 288] Q. You at all times selected the units to be tested by the Government, didn't you?

A. I will have to check my memory on that. No, there were several lots which I did not select.

Q. As to those several lots, who selected the units to be tested by the Government?

A. That I do not know. The person actually selecting the samples.

Q. Would it have been one of your assistants?

A. No, sir.

The Court: Well, excuse me, but weren't you in charge of this whole operation?

The Witness: The operation—

The Court: Were you or weren't you?

The Witness: Yes, sir.

The Court: If you didn't make a selection, didn't you authorize somebody to make a selection?

The Witness: Yes, sir.

The Court: Whom did you authorize to make a selection?

The Witness: The quality control foreman of the Standard Coil Products.

The Court: That is a description of a Mexican general I don't understand. Who; not the title.

The Witness: Allen Sawyer.

[fol. 289] Q. You designated, then, Mr. Sawyer on occasions to select for the Government units that the Government was going to test; is that right?

A. No.

Q. I am talking about the units the Government is going to test. Who selected those?

A. Myself.

Q. Anybody else?

A. My subordinates.

Q. Who do you include in the term "subordinates"?

A. Mr. Harry Brown.

The Court: Just a moment. Did you authorize Brown to make a selection?

The Witness: Yes.

The Court: Who else?

The Witness: Mr. Leo Kowlaik.

The Court: Did you authorize him to make a selection?

The Witness: Yes. Mr. Manugian.

The Court: Did you authorize him to make a selection?

The Witness: Yes. Mr. Zubek.

The Court: Did you authorize him to make a selection?

The Witness: Yes. Mr. Joseph Arruda.

[fol. 290] The Court: Did you authorize him?

The Witness: Yes.

The Court: Is this the first time you have mentioned him?

The Witness: Yes, sir.

Q. Anybody else you authorized to select the choice for Government inspection?

A. I do not recall at the present time.

Q. Mr. Sawyer?

A. No, sir.

Q. Did Mr. Sawyer ever select the units for Government inspection?

A. No, sir.

The Court: What do you mean by "authorized"?

Mr. St. Clair: I understood him to say he did.

Q. Is that in error?

A. If I did, it was in error.

Q. Don't watch Mr. Mitchell shaking his head, just answer the question.

A. I am not watching Mr. Mitchell.

Q. Now, in selecting these units you had a definite procedure whereby you would determine how many units you would select out of each lot for test, wouldn't you?

A. Yes, sir.

Q. And one of the things you would do, as I remember [fol. 291] your direct examination, was to evaluate the results in order to determine the sampling plan to be applied to the units; is that right?

A. I will have to—I don't quite understand that question.

Q. Let's see if I can make it a little more understandable. You would evaluate the results of the tests conducted by the Government, would you not?

A. Yes, sir.

The Court: A little more literally, you looked at the sheets that were handed you by the Government?

Q. Yes, and you would analyze those sheets?

A. Yes.

Q. To determine how many units in the future you were going to draw out of each lot for test?

A. Yes, sir.

Q. Depending, then, on the past performance you, as Government inspector in charge, would determine in the future how many units of each lot would be drawn for testing?

A. Yes, sir.

Q. Now, there were three standards of test applicable, were there not?

A. I don't follow the standards.

Q. Well, there was tight testing?

A. Tightened.

Q. Tightened testing; right?

[fol. 292] A. Yes.

Q. That would mean you had to take more units from out of each lot for testing; right?

A. Yes.

Q. And then there was normal testing?

A. Yes.

Q. In which you would take out a somewhat lower number out of each lot for test; is that right?

A. Yes.

Q. And then there was the ultimate, the third one?

A. Reduced.

Q. Reduced testing in which you would take out the fewest number of each lot for testing; is that right?

A. Yes.

Q. And based upon past performance you would then designate to the contractor that from now on you were going to take either reduced, a number that would satisfy the requirements for reduced testing, or normal testing or tightened testing; right?

A. Yes.

Q. Now, the time came, did it not, in the course of your duties as Government inspector when you put the company on tightened testing, didn't you?

A. In relation to what test?

Q. In relation, first, to any test.

[fol. 293] A. Yes.

Q. When was the first time that you put the company on tightened testing with respect to any test?

A. I would have to look at my memos here.

Q. Would you, please?

A. (Examining). On the 8th of February in relationship to the pressure calibration test.

Q. And the year was 1957?

A. 1957.

Q. Now, that means, as I understand it, then, that prior to February 8, 1957 the results of the Government tests had been so unsatisfactory that from that date on until you changed it the company was now going to have to be submitted to a more rigorous pressure test; is that right?

A. Yes.

Q. And I assume that your evaluation as of February the 8th was an inaccurate one?

The Court: Are you making the assumption?

Mr. St. Clair: It is sort of a question. I will withdraw it.

Q. You were satisfied, were you, that your evaluation as of February 8 was accurate; is that right?

A. Yes.

Q. And it was based on information you had obtained during the Government tests prior to February 8 of 1957? [fol. 294] A. Yes.

Q. Which indicated that more than the usual or satisfactory number of machines were failing in the test?

A. Yes.

Q. How long was the company kept on tightened testing as far as pressure was concerned following February 8?

A. To the 10th of April, 1957.

Q. That would be, then, two months; is that right?

A. Yes.

Q. Approximately. To what level did you change the testing as of the middle of April as far as pressure is concerned?

The Court: Normal or reduced? Is that the question?

A. Normal sampling.

Q. Not reduced, but normal?

A. Normal sampling according to the procedure that we were using.

Q. In other words, your experience during the two months February through April on the pressure test was such that it would justify normal sampling but not reduced sampling; is that right?

A. I can't answer that question in that—based on that information of normal and reduced as the memo which was introduced states, a sampling plan, and that is the one I followed.

Q. What is the sampling plan, whatever the figures are, [fol. 295] which contain three grades, tightened, normal and reduced?

A. Not that letter. Not that memo.

Q. Did you change the format or the method of procedure in that memo?

A. No. That's the procedure that was agreed upon at the beginning of the order.

Q. And that had tightened, normal and reduced, didn't it?

A. I am not aware of what you are talking about.

The Court: What?

The Witness: I don't quite follow him.

The Court: I am sure it came out of your mouth. There are three stages of testing, one very severe, one average and one less than average?

The Witness: Yes, sir.

The Court: And, as I understand, you said the severe kind is, you said, the tightened test, the average is normal and the one that is the easiest is called reduced?

The Witness: Yes, sir.

The Court: Mr. St. Clair put the question to you on the basis of your terminology. You told us from February 8 to April 10, with respect to pressure you applied the most severe kind of testing, to wit, what you call tightened testing. You then said after that period of time you stepped down to the middle classification which, in your terminology, had been called normal testing. Now, isn't that correct?

[fol. 296] The Witness: Yes, sir.

The Court: That is all that Mr. St. Clair has asked you. He didn't ask you why you did it, or something to that effect. He suggested to you the reason you did it was that you found that the reduced testing ~~was no~~ longer necessary.

The Witness: Yes.

Q. But that normal was necessary?

A. Yes, sir.

Q. And that reduced would not be appropriate?

A. Yes, sir.

Q. How long did you keep the company on normal testing as far as pressure is concerned from April 10th?

A. Up to the 17th of October 1957.

Q. And on that date what change did you make, if any, as far as pressure was concerned?

A. It was placed on typing sampling.

The Court: Back again?

The Witness: Yes.

Q. And how long did it remain on typing following that date in October 1957?

The Court: You said typing sampling. You meant typing testing.

The Witness: Well, sampling and testing is in the same vein.

The Court: Oh, is it?

The Witness: Yes. Sampling is the samples you place— [fol. 297] you select more samples and find less defects, but tightened inspection doesn't mean we tightened up the limitation or reduced the tolerance.

The Court: You have now used another expression, tightened inspection. Nobody suggested that word until you just used it. Previously you had used the expression typing testing, and you used the expression typing sampling. As I understand it, tightened testing means you take more samples to test and that when defects are disclosed you reject more than you might otherwise have rejected; is that right?

The Witness: Yes.

The Court: It has nothing to do, of course, with a new scale of defects?

The Witness: No.

Q. And I take it, it has nothing to do with the energy with which you and your assistants proceeded with your duties; you always were as alert as you could be and worked as hard as you could?

A. I don't follow the reasoning for that question.

Q. I don't think you mean to suggest that on some days you were lax, and on other days you were normally active, and on other days you were extremely active. That is not the standard we are talking about.

A. No, sir.

Q. So that on October 17th, you were then back on typing [fol. 298] testing?

A. Yes, sir.

Q. How long did they remain on that?

A. Through the balance of the contract.

Q. And that would be April of 1958, right?

A. That would be the 3rd of March 1958.

Q. So then, as I understand your testimony, the company never got good enough at any time from the beginning of the contract to the end of the contract to warrant reduced sampling or reduced testing?

The Court: On pressure.
Mr. St. Clair: On pressure.

Q. Is that right?
A. Again I must--

The Court: Well, it is true, isn't it, you never had reduced sampling as the standard for pressure testing?
The Witness: In the vein of the memo, sir, we started originally with reduced.
The Court: You mean before February 8, 1957?
The Witness: Yes.

Q. Then you increased it, didn't you, you increased the degree of testing as time went on?
A. Yes.
Q. And the company never got good enough so that it got back to the original level as far as pressure was concerned; is that right?
[fol. 299] A. To the end of the second contract, no.
Q. Up to March 3, 1958 they had either been on typing testing or on normal testing?

The Court: Since February 8, 1957.

Q. Since February 8, 1957; isn't that right?
A. No.

The Court: What?
The Witness: I will have to--it is highly technical.
The Court: Well, nothing can be more helpful than the truth, and your answers to now exclude any variation, but I certainly will allow you to amend your answer.
Let me again tell you that this is a criminal case. There can be nothing more serious than a man's liberty or life. You are giving testimony in the most solemn kind of a proceeding known to the Constitution, and you again and again make statements which seem to be without qualification, and you come back after a little while and vary and qualify them.
Now, nobody minds at all if you occasionally make an error which you want to correct, but this has been happening repeatedly for several days.

Now, you in your answers gave us the impression that there were from February 8 to April 18, 1957, a period of typing testing, then from April 10, 1957 until October 17, 1957, a period of normal testing, and then from October 17, [fol. 300] 1957 to March 3, 1958 a period again of typing testing. And you now tell us that that isn't an accurate set of answers. Well, what is an accurate set of answers?

The Witness: In relationship, the word normal in typing is used in conjunction with the memo that was exhibited—I forget the exhibit.

The Court: Exhibit 20?

The Witness: Exhibit 20.

The Court: I don't care where you got your terminology; you gave it to us, and you have given us answers, whether right or wrong, which were certainly clear with regard to beginning dates and terminal dates.

And now, as I understand it, you want to withdraw those answers, or qualify them; is that right?

The Witness: Yes, sir.

The Court: Then go ahead and do it, but please remember that if your liberty were at stake you would be very concerned about a witness who was as shaky in his testimony, and then comes back and says something different a few minutes later. Just imagine you were the defendant and listening to testimony of that character.

The Witness: Yes, sir.

Q. Do you care to make some adjustment in your testimony, or some change?

A. Yes, sir.

[fol. 301] Q. Please do.

A. The word normal inspection and tightened inspection as used in relation to the memo which was introduced as Exhibit 20.

The Court: Well, using that as a dictionary and taking the terms from that, do you want to vary what you said?

The Witness: Yes, under that plan we could not use any reduced sampling, as I was asked the question.

The Court: There is nothing about reduced sampling in that part of your answer that I telescoped into my statement. Your testimony up to now—and you are at liberty

of course to change it if it is not correct—is that from February 8, 1957 to the end of the contract on March 3, 1958, there was no period of reducing testing, there was first a period of typing testing from February 8, 1957 to April 10, 1957, there was then a period of normal testing from April 10, 1957, until October 17, 1957, and then there was once again a period of typing testing from October 1957 to March 3, 1958. Now, is that your testimony, or do you want to vary it?

The Witness: No, sir, that is the testimony.

Q. Did I hear you say that was the testimony?
A. Yes.

The Court: And that is what you say is the truth?
The Witness: Yes.

Q. Now, with respect to temperature, what was the orig-
[fol. 302] inal standard applied by you with respect to temperature testing, commencing October 1956?
A. The normal.
Q. It started out on normal?
A. Yes.
Q. Were there any changes made in the temperature testing?
A. Yes.
Q. When was the first change made?
A. The 14th of October 1957.
Q. A year later, right?
A. Yes.
Q. What change was made then?
A. I instituted tightened inspection.
Q. And how long—?

The Court: Testing, not inspection.
The Witness: Inspection.
The Court: Now, will you please be consistent in your language and your terms? I realize that you have a unique vocabulary, with the word spurious meaning something different from what the rest of us mean, and the word conversion meaning something different from what the rest

of us mean, but I do wish that once you get upon a term that we understand you would stick to it.

Now, you have used the term tightened testing, and we have understood you to mean, or I have, that that refers [fol. 303] to the number of samples you take and the extent to which you make rejections on account of the number of defects which are disclosed, and it has nothing to do with the intensity with which any individual inspector works, or his energy or his conscience or his conscientiousness, and it has nothing whatsoever to do with a new scale of defects.

Now, you have so defined the term tightened testing that I think at least I can understand it, and I do not want you to use another frame which may mean something else, and about which I shall have to ask you for a new definition, especially since I have already discovered you carry a dictionary different from the rest of us.

Q. Following that date, then, in October of 1957, you put the company on tightened testing, did you not?

A. Yes, sir.

Q. How long did the company remain on tightened testing following October of 1957?

A. To the 3rd of March 1958.

Q. The end of the contract?

A. Yes.

Q. So that as far as temperature is concerned, the company's performance was never so good so as to warrant or justify a reduced testing?

A. Yes.

Q. Is that a correct statement?

[fol. 304] A. Yes.

Q. And that would be from the very beginning in October of 1956?

The Court: No, he said 1957.

Mr. St. Clair: I understand it was normal from October 1956 to October 1957.

The Court: I understand what you mean now. I beg your pardon.

Mr. St. Clair: I will withdraw the question.

The Court: That is all right, because I made the mistake. It was in the intermediate scale for a year, and then it was half a year on the more severe scale called typing testing.

Q. Now, with respect to humidity, on what level of testing was the company initially placed in October 1956?

A. Normal.

Q. Was there any change made thereafter in the level of testing as far as humidity was concerned?

A. Yes.

Q. When was the first change?

A. The 6th of November 1957.

Q. So that from October 1956 until November 1957, a period of roughly thirteen months, the company as far as humidity testing was concerned remained on a normal level?

A. Yes.

[fol. 305] Q. What change did you make in November of 1957?

A. Placed on tightened.

Q. And remained on tightened how long thereafter?

A. Until the end of the contract, that is, the 3rd of March 1958.

Q. And again, as far as humidity is concerned, the performance of the company was never so good as to warrant or justify being placed on a reduced level of testing; is that correct?

A. Yes.

Q. Was there a level of testing applied to the shock testing?

A. Yes.

Q. Commencing in October of 1956, what was the level applied by you to the company with respect to the shock testing?

A. I would have to look at the records.

Q. Would you, please?

A. (complying) It was on normal testing.

Q. Commencing in October 1956, then, as far as shock test is concerned, the company was placed on a normal testing basis by you?

A. Yes, sir.

Q. Was there any change made in that determination?
A. Yes, sir.
Q. When was the first such change?
A. The 8th of February 1957.
Q. And what change was made then?
[fol. 306] A. The Standard Coil Products, Incorporated was placed on reduced inspection.

The Court: Reduced testing?
The Witness: Testing.

Q. How long did the company stay on reduced testing?
A. Until the 24th of July 1957.
Q. On the 24th of July 1957, what change was made?
A. Returned to normal testing.
Q. May I interrupt at this point? That means, does it not, that from February until the 24th of July your evaluation showed an increasing number of rejected machines so that by the 24th of July you were required to put them on a higher level of testing; is that right?
A. Yes, sir.
Q. And was there any change made after July 24th in the level of testing applicable for the shock test?
A. Yes, sir.
Q. What change was made, and when?
A. On the 16th of August 1957, reduced testing was again instituted.
Q. That is, during the period from July until this time in August the company's performance increased, was bettered; is that correct?
A. Yes, sir.
Q. And it justified you in placing them on a reduced scale?
[fol. 307] A. Yes, sir.
Q. Was any change made after August?
A. No, sir.
Q. So it remained on reduced scale from August 1957 until March 3, 1958?
A. Yes, sir.
Q. Now, what records have you been testifying from?
A. A form called DD Form 745, first of November 1953, title, "Report of Sampling Inspection Attributes."

Q. What is the meaning, if you know, of the word Attributes as used on this form?

A. Attributes means we are—right now, sir, I wouldn't venture—

The Court: Well, attributes means qualities tested by the samples such as temperature, humidity, pressure and the like, doesn't it?

The Witness: Not necessarily. It has to do with the inspection, whether it is good or bad.

[fol. 308] The Court: You mean it is something that is attributed to it by the inspector and is not something which is inherent in the article itself?

The Witness: No, it is inherent in the article.

The Court: It has to do with the quality and the degree to which it meets a standard?

The Witness: Yes.

The Court: Is this Form 745 an Army Signal Corps form?

The Witness: Yes.

The Court: Bureau of Budget number attached to it?

The Witness: No, sir.

The Court: DB-745; isn't that what that is.

The Witness: I am not familiar with that phase.

The Court: I think I may undertake to say it is a form approved by the Bureau of the Budget.

Q. Is that a form completed by you?

A. Yes, sir.

Q. Submitted by you to someone?

A. Yes.

Q. To whom?

A. A copy of the completed form was furnished to Fong Foo and two copies, the original and a copy, furnished to the Chief of the Quality Assurance Operation Division in Philadelphia.

[fol. 309] Q. To Mr. Shapiro?

A. No, sir.

Q. And these reports contained the necessary information to justify your changing from one level to another of testing from time to time; is that correct?

A. Yes, sir.

Q. Was there ever any exception taken by your superiors to the changes you made in connection with the level of test that you determined was applicable for the company?

A. I don't quite follow—

The Court: Was there any, in Philadelphia, anyone who ever criticized you for making a change?

The Witness: No, sir.

Q. So, in so far as you know, the changes made by you were approved by your superiors, as far as you know?

A. Yes, sir.

Q. Did the company ever take exception to your determinations?

A. To the best of my knowledge, no.

Q. All right. Now, after the units were submitted by lots to you and to your assistants, tests were run on the units, first, for temperature; is that right?

A. You will have to specify for what position the units were submitted.

Q. Well, after the final operation test run by the contractor I had understood your testimony to be that then, [fol. 310] taking Lot No. 1, if you will, it was submitted as a lot in writing to you; is that right?

A. Yes.

Q. You selected from the lot a certain number of samples at random?

A. Yes.

Q. How many samples would you say you selected for the temperature test?

The Court: At the beginning.

Mr. St. Clair: At the beginning.

A. Five.

Q. And you selected five for the pressure test, did you not?

A. Yes.

Q. And five for the humidity test?

A. Yes.

Q. You did not select any separate number for any shock test, did you?

A. Not until later.

Q. So initially, starting in October with Lot No. 1, you selected, out of this lot of 180 to 200 units, 15 units, did you not?

A. For pressure, temperature and humidity calibration tests, right.

Q. And you selected them at random?

A. Yes.

[fol. 311] Q. And took possession of them?

The Court: That's a legal question.

Mr. St. Clair: I will withdraw it.

The Court: Removed them from them.

Q. Somebody recorded the numbers of the machines you selected, did they not?

A. Yes.

Q. Who did, if you know?

A. I did.

Q. You put those down on a piece of paper?

A. Yes.

Q. Is that the piece of paper that was at one time annexed to Exhibit No. 10?

A. I would have to see it.

The Court: 10-A for Identification.

Q. Here it is. Looking at 10-A for Identification, were those numbers placed there by you or by one of your assistants as representing the units withdrawn for testing by the Government?

A. In relationship to what tests, sir?

Q. What test does 10-A for Identification cover?

A. That is the electrical test.

Q. For the electrical test, then.

The Court: Excuse me, "electrical test" is a new word. Does that embrace all three, humidity, temperature and [fol. 312] pressure?

Mr. St. Clair: I understand, if your Honor please, those are covered under the name "other."

Q. Will you tell us what is encompassed in the word "electrical" as far as it relates to a type of test?

A. The word "electrical" is used through the initial sub-

mittals, the main various tests such as the performance test, the type test on the pressure calibration test. It was interchangeable at the beginning.

The Court: I am afraid I don't know what you are talking about. It has nothing to do with temperature and nothing to do with pressure and nothing to do with humidity; is that right?

The Witness: At the present time, no, sir.

The Court: I don't care about at the present time. I mean before 1956 it had nothing to do with any of the three?

The Witness: Yes, the word "electrical" was used on some of the submittal sheets for the calibration tests which we performed.

The Court: Remember you are now being asked about Lot No. 1. Lot No. 1 was the first lot you examined, according to your testimony?

The Witness: Yes, sir.

The Court: The first lot you examined, you examined in late September or early October, 1956. Have I made [fol. 313] a mistake up to now?

The Witness: No, sir.

The Court: When this first lot that you examined in the fall of 1956 you prepared, did you not, a sheet like Exhibit 10-A for Identification which you have in your hand?

The Witness: No, sir.

The Court: You did not?

The Witness: No, sir.

The Court: Did somebody under your direction prepare such a sheet?

The Witness: Sir—

The Court: We are now talking about 10-A.

Mr. St. Clair: 10-A, if your Honor please, doesn't happen to relate to Lot No. 1.

The Court: Like it. I don't mean that is Lot No. 1.

The Witness: No, not a sheet like this, sir.

The Court: Let's give him one that looks like one he has.

Q. Did someone annex to the submission sheet for Lot No. 1 a list of serial numbers of the machines that had been withdrawn for tests?

A. Yes.

Q. Was it on a piece of paper similar in make-up to Exhibit 10-A for Identification?

[fol. 314] A. No, sir.

Q. In what way did it differ?

A. I would have to see the submittal sheet before I can answer that.

Q. Would you mind doing that over the evening recess?

A. The submittal sheet is in the court room here. It was entered as an exhibit.

Q. I show you Government's Exhibit No. 15 and ask you if—this, I take it, is the submittal sheet for Lot No. 1 for the tests described thereon?

A. Yes.

Q. What tests were described on Exhibit No. 15?

A. Electrical and shock tests.

Q. As used on Exhibit 15 the word "electrical" encompasses, then, as I understand it, temperature, pressure and humidity calibration tests?

A. Yes.

Q. And then in addition to those tests the shock test was also included in this submission?

A. Yes.

Q. This submission being signed by one Allen R. Sawyer?

A. Yes.

Q. And it also has your signature as the Government inspector; right?

A. Yes, sir.

[fol. 315] Q. Now, annexed to Exhibit 15—was there annexed to Exhibit 15, when submitted to you, any other piece of paper containing a list of serial numbers?

A. I don't quite follow you.

The Court: I think your question is mistaken. I thought that the numbers were written by the Government inspector and not by the company.

Mr. St. Clair: That is simply what I am trying to establish.

Q. Who wrote the numbers down?

A. Which numbers?

The Court: The selected 15 samples.
The Witness: The Government.

Q. That is, you or your assistants: right?
A. Yes, sir.
Q. And those were the ones where you were going to run through these calibration tests; right?
A. Yes.
Q. As far as the temperature is concerned, that was run on the temperature test chamber designated No. 11 on Exhibit No. 4, was it not?
A. Yes.
Q. And that was a piece of Government owned property, wasn't it?
A. I couldn't answer that at the proper time.

[fol. 316] The Court: It was occupied by the Government under some arrangement which may have been a license, may have been a lease or may have been some other form of occupation in which the Government had right of access.

Q. You and I met in a conference just three days ago with the United States Attorney, didn't we?

Mr. Mitchell: Your Honor, the contracts speak for themselves.
Mr. St. Clair: Oh, no.
The Court: I must say I don't know anything at this stage about whether the occupancy of that particular part of the second floor was under a grant of the fee or a lease or license or what. Does it matter?
Mr. St. Clair: I am only speaking of the machinery itself.

Q. It is true, is it not, that the machinery used for the calibration test for temperature was owned by the Government during the test?
A. That I cannot testify to.

The Court: You don't know. Maybe the Government will stipulate.
Mr. St. Clair: Didn't you tell me that three days ago?

(Discussion off the record.)

The Court: Does the contract cover the matter?

[fol. 317] Mr. Caner: The Government will stipulate that the equipment was owned by the Government; that the Government permitted the contractor to use it during the period of the contract and that it was sold to the contractor by the Government at the end of the contract.

The Court: I instruct the jury it is none of their business nor of mine what happens to the machinery after the contract terminates and the only part of the statement of Mr. Caner that is relevant is that the Government owned the machinery.

Mr. St. Clair: Thank you very much, Mr. Caner.

Q. That is true, of course, with respect to the equipment used for the pressure calibration test; right? Isn't that right?

A. I couldn't honestly answer that and say for sure whether it was or was not.

The Court: You don't know anything contrary to the stipulation just made, do you?

The Witness: No.

Q. And the humidity is the same?

A. Yes.

Q. With respect to the temperature test, we are now testing the unit. We have already calibrated it once, that is, the company?

A. Calibrated it on the machine.

[fol. 318] Q. Designated No. 3; is that correct?

A. Yes.

Q. Now it has been submitted to the Government and the Government is now testing it on machine No. 11 for calibration; right?

A. Yes, sir.

Q. For temperature. Now the machine designated No. 11 on Exhibit No. 4 is controlled, is it not, by the right-hand temperature control station immediately below it and above the words "single head recorder" in the second line from the top on Exhibit No. 4?

A. Yes.

Q. And that station there has a single head recorder, so-called?

A. Yes.

Q. Is this machine over here a single head recorder similar to the one used?

The Court: What have you in your hand?

Mr. St. Clair: I have an as yet unmarked piece which I now offer for identification.

The Court: Exhibit A for Identification.

(Single head recorder marked Defendants' Exhibit A for Identification.)

Q. I show you Defendants' Exhibit A for Identification and ask you if you can identify—and ask you if that is similar to the single head recorder used in the control [fol. 319] station for Station No. 11 on Exhibit No. 4?

A. It is.

Mr. St. Clair: May this be marked, if your Honor please, as Defendants' Exhibit A?

The Court: Without objection?

Mr. Caner: No objection.

(Defendants' Exhibit A for Identification received in evidence.)

Mr. St. Clair: Mr. Foreman and members of the jury, as Defendants' Exhibit A, it is a machine or device known as a single head recorder. I call your attention to the roll of tape on the right-hand side and above that the roll of dark material apparently similar to a typewriter ribbon, a little stylus, I don't know whether you can see it over here, that I am moving with my finger.

The Court: What does it make, dots and dashes on the white paper?

Mr. St. Clair: I believe it would if this were threaded through.

Q. Is that right, Mr. Palliotto?

A. Yes, sir.

The Court: In short it is like a telegraph instrument in that it records the symbols of the Morse Code for letters?

The Witness: Yes, sir.

[fol. 320] Q. And the tape which was marked as Government Exhibit No. 11 is a sample of the tape that will be produced by Defendants' Exhibit A; is that right?

A. Yes.

Q. That was on top of a table at the control position for the machine designated No. 11 on Exhibit No. 4, wasn't it?

A. Yes.

Q. And was operated in full view of everybody?

A. Yes.

Q. And was part of the equipment used by the Government in its testing?

A. Yes.

Q. Now, the tape, as it came off of the machine, what was done to it? Was it caught in a basket or was it in a roll or how was it accumulated?

A. Some of it was torn off in strips and thrown away and some was taken and rolled up into a little circle, and some was just folded flat, one piece over the other.

Q. What was supposed to determine what should be retained and what should be thrown away?

A. To my knowledge nothing was supposed to be thrown away on any samples that were tested for the Government.

Q. Did you see any thrown away?

A. I could not swear to that now.

Q. Didn't you just tell us that some of it was thrown away?

[fol. 321] A. Yes, I did say that.

Q. What you really meant was that you heard that some had been thrown away?

A. Yes.

Q. You never saw any thrown away of your own knowledge?

A. I couldn't say what unit it was from but I did see—

Q. Did you ever see any tapes thrown away?

A. Yes.

Q. When?

A. During the course of the Government inspection.

The Court: Let's not have any confusion on this point. You mean you saw tape in a waste basket or you saw somebody in the process of throwing it away?

The Witness: I saw some in the basket and in the process of throwing it away.

The Court: Then you must have seen somebody actually throw it away.

The Witness: Yes.

The Court: Who was it?

The Witness: Viola Faria.

Q. Where was she sitting?

A. She was sitting at the position with a single head recorder, the second unit in the second row down.

Q. And she was conducting this test; right?

A. Yes.

[fol. 322] Q. Under your supervision?

A. Yes.

Q. What instructions did you give her—

The Court: I must—was she a Government employee?

The Witness: No.

The Court: Was she subject to your instruction?

The Witness: No.

The Court: How could you be giving her instructions?

The Witness: I didn't actually give her instructions.

The Court: I don't know how many times I have to tell you this is a criminal case in which it is of the greatest importance that the particular individuals who acted and the particular individual who gives instructions is properly identified. There are two persons on trial here who may or may not have had anything to do with conduct which is wrongful. The Government charges them personally, as well as the corporation, and you owe it to your oath and you owe it to them to be very particular in connection with any statement of facts with respect to any individual or any instruction. If you were on trial for your liberty you would be well aware of how important it is to be accurate.

[fol. 323] Q. Now, Mrs. Faria was, as far as you know, on the payroll of the company, was she not?

A. Yes.

Q. But she was under your direction and control when she was performing the Government test, wasn't she?

A. No.

Q. You had a right to tell her what to do and not to do, didn't you?

A. Yes.

Q. And she was operating a Government machine, wasn't she?

A. Yes.

Q. And you were standing right by her?

A. Yes.

Q. Supervising what she did?

A. No, sir.

Q. You had a right to? You just told us.

A. I had a—gave my instructions to the Quality Control Section.

Mr. Angoff: I object, your Honor.

The Court: I should think you would. Mr. St. Clair, I don't understand this last set of questions that has been put. Of course any man may talk to any other man and suggest that he do something but before A can instruct B in the sense in which you were using the word "instruct" B must be an employee of A or they must have a common [fol. 324] employer who has vested in A the power over B or there must have been some contract or other arrangement under which A is entitled to instruct B. So far I don't know what the basis is for your questions with respect to instructions. So far it hasn't appeared to me that the Government had any arrangement, by contract or otherwise, whereby its inspector, who is authorized to give instructions to some employee of the corporation to assist the Government inspector in connection with the so-called testing.

[fol. 325] Mr. St. Clair: I submit, if your Honor please, that the testimony, every bit of the testimony, is consistent with precisely that situation, that this is a function being performed by the government on its own machinery with employees of the company but subject to the governmental control at this point.

The Court: I am not satisfied that there is any showing of that as yet. That may or may not be true, but does the contract refer to any obligation on the part of the company to supply persons—?

Mr. St. Clair: Yes, it does.

The Court: Then will you please show it to me. Obviously I haven't read the contract.

Mr. Caner: Subparagraph 5-(c).

The Court: Which one? Exhibit 2 or 3, or both?

Mr. St. Clair: I think it is the same in both. It is in the printed form of the contract.

(Conference at the bench.)

The Court: I now turn to the so-called general provisions which are part of Government's Exhibit 2, and speaking very roughly, about 25 pages after the beginning of the contract, and I note the part I have been asked to look at, which is Paragraph 5-(c), and I read the language because it seems to me not to be in point, but I am willing to be told that I don't read it correctly. (Reading):

> [fol. 326] "If any inspection or test is made by the government on the premises of the contractor or a subcontractor"—

that provision is plainly applicable because this is the case—

> "the contractor without additional charge shall provide all reasonable facilities and assistance"—

and the question is the meaning of the word assistance—

> "for the safety and convenience of the government inspectors in the performance of their duties."

It is assistance for the safety and convenience.

> "If government inspection or test is made at a point other than the premises of the contractor or a subcontractor" —

that is not the situation with which I am dealing.

Now, as I read that clause, it is a clause under which the contractor provides facilities and assistance for the safety and convenience of the government inspectors. There is no pledge on the part of the contractor to furnish junior

assistants, associate inspectors, tally men, or other persons who will perform inspection functions.

Mr. St. Clair: Well, if your Honor please, in the first place I think it should be read also in connection with the first paragraph, being (a), that brief paragraph.

[fol. 327] The Court (Reading):

> "All supplies shall be subject to inspection and test by the government to the extent practicable at all times and places including the period of manufacture, and in any event prior to final acceptance."

There certainly is no authority there under which the contractor agreed to supply men to perform inspection functions in corroboration with or under the direction of any government inspector.

Mr. St. Clair: According to the provisions of 5 (a), the government is doing the testing.

The Court: We are all agreed upon that.

Mr. St. Clair: Whatever assistance necessary to facilitate the government doing the testing—

The Court: Oh, no, excuse me; let me just read that again, because this is where I thought you had it wrong. (Reading:)

> "all reasonable facilities and assistance for the safety and convenience of the government inspectors"—

convenience meaning helping to move around furniture and whatnot so that they will be able to move readily. It is not to participate in the inspection process.

Mr. St. Clair: Well, at least the government is doing [fol. 328] the testing, and the people doing the testing must be under the control of the government.

The Court: I might be foolish enough to be there for some purpose which was a purpose of my own, and somebody might call upon me to help and I might accept direction, but that would not necessarily make me, from the point of view of my employer, somebody who was assigned by my employer for the purpose of corroboration or assistance.

And it may be very important, because we have a corporate defendant here, and we have two individuals.

Mr. St. Clair: I am perfectly aware of that. May I call your Honor's attention to one further document, the standard Mill R11005-B, which has been marked as an exhibit twice, once as 2-F and 3-B, on Page 11 thereof, Paragraph 4, entitled "Quality Assurance Provisions."

The Court (Reading):

> "At the discretion of the inspecting agency, any tests specified herein for accomplishment by the government will be interpreted to mean tests to be accomplished either by or under the direct supervision of the government, with the final decision as to acceptance or rejection in either case resting with the government inspector."

Well, I take it, it is perfectly clear from this that it is [fol. 329] not necessary from the government's point of view that the inspection be by a government officer or employee; it can be by somebody under the direct supervision of the government inspector.

Now, the question, which is one of fact at this stage, is whether a person like Sawyer, who was an employee of the corporation, was at that time acting under the direct supervision of a government inspector such as Mr. Palliotto. Now, I think here we have got a question of fact which you must put to Mr. Palliotto to straighten it out.

Mr. St. Clair: I think the record is already clear—

The Court: It isn't clear to me, and maybe it is a matter which would be more clarified anyway if it isn't clear to me. Would you just put a question or two to him and let's get it straight.

Q. You testified a little earlier that these units were selected by you.

A. Yes.

Q. At random?

A. Yes.

Q. They were referred to in your direct examination as "my units"; right?

A. Yes.

Q. And you told me a little while ago that nobody was supposed to touch them except under your control and supervision.

[fol. 330] A. Yes.

Mr. St. Clair: I submit it, your Honor.

The Court: That doesn't prove that the person was acting under his control and supervision. A thief might get in.

Q. Well, Mrs. Faria, when she was conducting the test, was touching the instruments, wasn't she?

A. Yes.

The Court: At your request?

The Witness: Yes.

The Court: All right, that is enough. Now, I take it, from this point on the cross-examination won't take very much longer on this issue.

Mr. St. Clair: Not much longer on this issue.

The Court: How much longer?

Mr. St. Clair: Probably half an hour.

The Court: Are you going to cross-examine some?

Mr. Angoff: Some, but not on this technical matter, and I will try not to duplicate.

The Court: Now, it is only because of its bearing upon other litigation that I want to know the best estimate the government has, and I realize it won't be a very accurate one, as to the number of days more that the government's case will take. I realize you won't get it correct; I have had enough experience to realize that.

[fol. 331] Mr. Caner: Four or five, your Honor.

The Court: So I think I was correct, wasn't I, when I indicated there was no risk to the second case, or the case after this, that it wouldn't be wanted next week, taking into account that I am not sitting next week on Thursday or Friday.

Mr. Caner: Yes, your Honor.

Mr. St. Clair: You are not sitting this week either on Thursday?

The Court: That is correct; that is the Judicial Conference. But I am sitting tomorrow at ten o'clock. Please adjourn the court until ten o'clock.

(Adjourned to 10 a.m. Wednesday, September 14, 1960.)

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VOLUME II

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1961

No. 64

FONG FOO, ET AL., PETITIONERS,

vs.

UNITED STATES

No. 65

STANDARD COIL PRODUCTS CO., INC.,
PETITIONER,

vs.

UNITED STATES

ON WRITS OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITIONS FOR CERTIORARI FILED MARCH 7, 1961
CERTIORARI GRANTED JUNE 19, 1961

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

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ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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VOLUME II

[fol. 332]

FIFTH DAY

Court Room No. 6
Federal Building, Boston
September 14, 1960

The Court: Will the witness come back on the stand, please?

CONSTANZ PALLIOTTO, Resumed

Cross examination.

By Mr. St. Clair (Continued):

Q. Mr. Palliotto, before recess yesterday afternoon I started to ask you about several so-called calibration tests being conducted by the Government under your supervision, and I think that we had marked an exhibit as Defendants' Exhibit A, the single head recorder, or a single head recorder similar to the one shown at the Temperature Control Station immediately below Station No. 11 on Exhibit 4, is that correct?

A. Yes.

Q. Now that was part of the Temperature Calibration Test machinery, was it not?

A. Yes.

Q. And it was placed on top of a table as shown on the Temperature Control Station on Exhibit 4 that I have just referred to?

[fol. 333] A. Yes.

Q. And it was in plain view of anyone who wanted to look at it?

A. If they got close enough to it.

The Court: I beg your pardon?

The Witness: If they got close enough to it.

Q. I can stand here and see it on Mr. Duwan's desk. Was it in as plain view as that?

A. Yes.

The Court: And you are now about 30 feet away?
Mr. St. Clair: Just making—
The Court: Maybe it is nearer 20 feet.
Mr. St. Clair: Maybe 20 feet might be a little more accurate for the record, can we agree that I am approximately 20 feet away from Exhibit A?

(A pause.)

The Court: Whether he agrees or not, I so state. It is not less than 20 feet.

Q. It was in as plain view as it is now in the court room, is that right?
A. It all depends where the person was standing that was looking at the device.

The Court: The question is: was it in plain view?
The Witness: Yes.

Q. The tape itself, was run through the machine and [fol. 334] out on to the top of the table, was it not?
A. Yes.
Q. And did it make an audible sound?
A. Yes.
Q. Could you read the Morse Code from Exhibit A?
A. With experience you can.

The Court: Now just a moment. I am going to tell you that you are giving the impression, which I am sure you do not want to give, of grudging testimony and testimony which you want to be hostile to the defendant. I am sure you do not intend to do that, but the tone of voice you are using and the reluctance of your answers and the like are transforming you into a witness who appears to have a hostility. I don't think you want to give that impression.
The Witness: No, sir.
The Court: I am sure you recognize that in matters of this sort, you and everybody else have no personal interest.
The Witness: Yes, sir.

Q. You had at some time, at least during the course of the performance of these contracts, a knowledge of the Morse Code, so that you could read it audibly?

A. Yes.

Q. You also could read it as it was printed out on the tape, could you not?

A. Yes.

[fol. 335] Q. And I assume that you instructed your assistants to be able to do the same thing?

A. Yes.

Q. It was important to your job, was it not, to know the Morse Code?

A. Yes.

Q. So that you would be able to read it as you heard it?

A. Yes.

Q. And of course read it printed on any tape?

A. Yes.

(Discussion off the record.)

Q. Did you ever conduct or operate any of the machinery, for example at the temperature control station I have heretofore identified, yourself personally?

A. No, sir.

Q. Never even to test out the machinery?

A. Yes, sir, if the code machine—if it was running, if it was coding properly, yes.

Q. That is, you would sit in the position and actually operate the equipment?

A. Not the equipment. It would be parts of it.

Q. What parts of it would you operate?

A. The code machine.

Q. That is similar to Exhibit A?

A. Yes.

[fol. 336] Q. And how was that operated at the temperature control station?

A. That had two buttons, one to control the motor which drew the tape through the machine, and the other to control the relay which coded it.

Q. So that perhaps it will be a little more clear, am I correct that the relay is this part here (indicating)?

A. Yes.

Mr. St. Clair: Mr. Foreman, and Members of the Jury, the relay the witness is referring to is this part of Exhibit A here that I am now touching, to which there is annexed

what appears to be a stylus resting on the typewriter ribbon.

Q. And that is the portion of Exhibit A, I take it, that actually performs the printing?

A. Yes.

Q. Then the other is the motor that drives the roller that rolls up the tape; is that right?

A. Yes.

Q. And is that the motor right here (indicating)?

A. Yes.

Mr. St. Clair: Mr. Foreman, and Members of the Jury, the motor that the witness has referred to is this motor here on Exhibit A, which is that portion of Exhibit A to which the red tag is attached which bears the exhibit designation.

Q. Now, were those elements of Exhibit A sometimes not [fol. 337] functioning properly?

A. Yes.

Q. And you would sit down and run them to see if they did?

A. I couldn't answer that the way the question was asked me.

The Court: I don't quite understand. You mean you can't tell us whether you sat or didn't sit?

The Witness: I sat and switched the buttons on, yes, but not because the instrument was defective or had trouble with it.

Q. Well, you pushed the buttons and some of the tape ran through the machine?

A. Yes.

Q. And this was just sort of a check made by you?

A. Yes.

Q. And you took that tape, I take it, when it was finished, and looked at it?

A. Yes.

Q. To see whether or not it did function properly?

A. Yes.

Q. And when you were satisfied either way you threw it away, didn't you?

A. Yes.

Q. Thank you.

And likewise, persons conducting the test under your supervision would do the same thing from time to time, would they not?

[fol. 338] A. Yes.

Q. And when they are all through looking at the tape, they would throw it away, too, wouldn't they?

A. Yes.

Q. Thank you. Now, in the normal course of events in the conducting of these government tests, these tapes were delivered to you, or picked up by you or your assistants, were they not?

A. Yes.

Q. In fact, they were the government's tapes, weren't they?

A. Yes.

Q. Do you have any tapes for the month of October 1956?

A. No, sir.

Q. Did you destroy them?

A. Yes, sir.

Q. When did you destroy them?

A. At various times through the course of the first contract and the second contract.

Q. What is the first month for which you have any tape?

A. I do not have any now.

Q. Well, what is the first month for which you preserved any tape that you handed to the United States Attorney?

The Court: Well, I don't know that he ever did hand any. Did you ever hand any tapes to the United States Attorney, ever?

A. I don't know as I personally handed it to him or it [fol. 339] was in the files that I brought in, sir.

Q. I am simply trying to find out what is the first month you know of that there are tapes in existence, for which there are tapes in existence.

A. I do not.

The Court: Well, excuse me. We have some tapes here in the court room. Now, I of course don't know whether

those tapes were tapes on which records were made at the time of the contract. Do you know whether the tapes which have been introduced in court were tapes which were made and recorded at the time the contracts were in existence? Answer whether you know.

The Witness: No, sir.

Q. Can you tell from looking at the tapes that are in the court room for what month they represent testing being done?

A. I can try.

Q. Would you, please?

The Court: Well, you had better show it to him.

The Witness: Which tapes are you talking about, sir?

Q. Well, let's take the tapes that are in evidence first. They are more easily dealt with.

The Court: All right, you can stay where you are for the moment.

Q. I shall bring over to you Government's Exhibit—I believe it is No. 11, which is a single, a so-called single tape [fol. 340] of the type printed on Exhibit A; is that right?

A. Yes.

Q. Can you tell me for what month that represents the results of government tests?

A. Well, it is Unit 1693. I couldn't establish whether that is the first contract or the second contract.

Q. Is there any record here from which you could establish that fact?

A. I would have to do some research, yes.

Q. There is a record here; is that right?

A. I believe so. All the records are here.

Mr. St. Clair: I wonder, if your Honor please, if we might take the time to have him look at it.

The Court: Absolutely.

Q. Would you ascertain, if you can, sir, for what month this tape Exhibit 11 was made, in what month?

(Witness examines documents.)

Q. What lot is represented by this tape, Government's Exhibit 11?

A. Lot 10.

Q. And do you have the so-called submittal sheet for that lot?

A. Yes.

The Court: Have you had that marked previously?

Mr. St. Clair: No, not yet.

The Court: Let's get that for identification. That is Exhibit B for Identification.

[fol. 341] Mr. St. Clair: May that be so marked, if your Honor please?

The Court: Submittal sheet, Lot 10.

(Submittal sheet for Lot 10 marked Defendants' Exhibit B for Identification.)

The Court: Just from the number, I take it that it is one of these early lots under contract No. 1. Is it?

The Witness: Yes, sir.

The Court: It is probably, therefore, roughly speaking, October, or maybe November, 1956?

The Witness: I think the date is right on it.

The Court: All right.

Q. I show you Exhibit B for Identification and ask you the date thereof?

A. The 29th of October 1956.

Q. And this was submitted over the signature of one A. R. Sawyer, right?

A. Right.

The Court: There is no reason that shouldn't be admitted, is there?

Mr. Caner: No objection.

The Court: Admitted as Exhibit B.

(Defendants' Exhibit B for Identification received in evidence.)

[fol. 342] Q. Now on Exhibit B there is listed in pencil on the left-hand margin a series of numbers, is that correct?

A. Yes.

Q. Who entered the numbers on the left-hand margin of Exhibit B, if you know?

A. I did.

Q. This shows a group of five numbers, except for the last group?

A. Yes.

Q. The first group has five numbers under the letter P, which I take it stands for pressure?

A. Yes.

Q. The second group has five numbers under the heading 2-T, which I take it stands for Temperature?

A. Yes.

Q. The third group is under the heading RH, which is Relative Humidity?

A. Yes.

Q. The last group of three is under the word Shock, which is Shock Test?

A. Yes, sir.

Q. This also carries your signature as the Government inspector, is that correct?

A. Yes, sir.

Q. Under the heading Remarks there is the following: [fol. 343] "3 pulled out for SESA—" what does that mean?

A. That means three samples out of the lot were taken and put aside by me for the use of the Signal Equipment Support Agency under the contract requirement.

Q. In other words, that refers to those tests that I mentioned the other day that someone else performs regularly, perhaps on a monthly basis, is that correct?

The Court: What was that again: that somebody performs what regularly on a monthly basis?

Mr. St. Clair: Some additional tests.

Q. Is that correct?

A. Yes, sir.

Q. That is sort of, as I understand the system, someone would come in from the outside, perhaps Mr. Lewis, on a regular interval of perhaps a month and he would kind of check the over-all results by pulling out a few units and testing them himself, is that right?

A. Yes, sir.

Q. In this instance you selected for his testing three units?

A. Yes, sir.

Q. This is a sort of a check on you and on everybody, isn't it?

A. No, sir.

The Court: Well, may I just look at that for a moment? I would like to see it. I am now examining Exhibit B. [fol. 344] Will you define the words SESA?

The Witness: Signal Equipment Support Agency.

Q. Those tests of the Signal Equipment Support Agency were not conducted under your supervision, were they?

A. No, sir.

Q. They were conducted under the supervision of some other Government inspector?

A. Yes, sir.

Q. Normally who would it have been between the period October, 1956 and, let us say, November, 1957?

A. Mr. Lewis or Mr. Romanski.

The Court: Mr. Lewis or whom?

The Witness: Romanski, R-o-m-a-n-s-k-i.

The Court: Who is he?

The Witness: Representatives—

The Court: Who is he?

Q. Mr. Romanski.

A. He is an engineer.

The Court: A little bit more, please.

The Witness: He represents—

The Court: You cannot tell us that. Who employs him?

The Witness: The United States Army Signal Equipment Support Agency at Fort Monmouth, New Jersey.

The Court: Senator McCarthy's—

[fol. 345] Mr. Romanski is a member of the Armed Forces?

The Witness: No, he is a civilian employee.

Q. Perhaps you can help us. Is the Signal Supply Equipment Agency substantially the same thing as the agency by which you are employed?

A. I don't know what the relationship is between the two of them. I know they work together, and there have been changes, and I couldn't possibly tell you if they are the same or independent organizations.

Q. They are different organizations in any event?

The Court: Different from the one you work for?

Q. You work for another agency other than this agency?

The Court: Are you an employee of the Signal Equipment Support Agency?

The Witness: No, sir.

The Court: Then you work for some other agency?

The Witness: Yes, sir.

The Court: The mere fact you work ultimately for Uncle Sam does not make you a member of that organization. I ultimately work for Uncle Sam in one sense.

The Witness: Well, the reason I was puzzled is because there is an interchange between the two agencies that has occurred over a period of time, and I can't keep track of it. We don't get notified directly in the field of changes.

[fol. 346] Q. You work out of Philadelphia?

A. Yes, sir.

Q. Mr. Lewis and his associate, Mr. Romanski, work out of Fort Monmouth, New Jersey?

A. Yes, sir.

The Court: I would like to make it clear that when I said that I work for Uncle Sam, I hope the jury realizes that I regard myself as part of an independent judiciary, but the tax money that you pay goes to pay my salary, or part of it, not as much as might be desired.

Mr. Angoff: I can represent you, your Honor.

Mr. St. Clair: If your Honor has finished with Exhibit B—?

The Court: Yes.

Mr. St. Clair: Mr. Foreman and members of the jury, I show you Exhibit B, which is in the form I think that is familiar to you, the regular submittal form, signed by Mr. Sawyer and Mr. Palliotto, containing on the left-hand margin, as you look at it, the several serial numbers under

the various test headings. Mr. Palliotto has identified the number written on Government Exhibit 11, which I hold in my hand, as being one of those serial numbers, 1693, which appears under the heading Shock Test, as the first item.

The Court: Maybe you had better pass that around. [fol. 347] It has some relationship to this case.

Q. Now on Exhibit 11 is written in pencil, in addition of course to Mr. Duwan's entry of Exhibit 11, the words "before" and the numbers "1693". Whose writing is that, if you know?

A. The name of the individual I do not know.

Q. It is not yours?

A. No, sir.

Q. What is the significance, if you know, of the word "before"?

A. This is a tape prepared for the unit showing the results of the code, the code received from the unit before the Shock Test, before it was subjected to the Shock Test. The writing on here was written on by the operator running this tape.

Q. Well, that is what you presume?

A. Yes, sir.

Q. You do not recognize that handwriting?

A. Not the handwriting, no, sir.

Q. Nor the writing utilized in making the figure 1693?

A. No, sir.

Q. On Government's Exhibit 11, which was offered as a sample, there are various other figures written, like the next one reading along is 1371. What is the significance, if you know, of that?

A. That is the serial number of the second unit.

[fol. 348] Q. In so far as you know it is an accurate figure?

A. Yes.

Q. Which is true with respect to the first figure 1693?

A. Yes.

Q. And the next figure that I see on the tape is the figure 533?

A. Yes.

Q. That represents, I take it then, the serial number of another unit?

A. Yes.

Mr. St. Clair: (To the Court and Jury) These three numbers 1693, 1371 and 533 are the numbers appearing at the bottom under the heading Shock.

Q. When did you first find the piece of tape, that piece of tape, Mr. Palliotto?

A. Find it where?

Q. Wherever you found it?

A. This is the first I have seen of this particular tape.

Q. It is—

The Court: Just a moment. Are you quite sure about that?

The Witness: Yes, sir. I have not seen this tape—the only time I saw it was when the unit was tested. That was back in 1956 or 1957.

The Court: That, I think, is what the question was.

[fol. 349] Q. You saw it then?

A. Yes.

Q. Did you turn this tape over to a representative of the United States Attorney's Office for examination by defendants' counsel some time ago?

A. I turned the complete record—

Q. This tape, please?

A. I don't recall the tape.

The Court: Well, is it fair to say you delivered a bundle of papers to the United States Attorney?

The Witness: Yes.

The Court: Is that right?

The Witness: I delivered two bundles, sir.

The Court: All right. And among those bundles this may or may not have been included, but you don't know because you did not examine each and every paper in the bundle? Is that what you are saying?

The Witness: That is right, sir.

The Court: Can you think of any place from which the United States Attorney could have gotten this tape except from those bundles?

The Witness: No, sir.

The Court: So far as you know a fair inference would be that this paper was included in the bundles, but you never looked so minutely at the bundles to be able to [fol. 350] swear this tape was in the bundles?

The Witness: Yes, sir.

The Court: That is your testimony?

The Witness: Yes, sir.

The Court: Perhaps the United States Attorney can say that the only source from which he got the tape was this? Or were there other sources?

Mr. Caner: Certainly.

The Court: There were no other—

Mr. Caner: No. We got the tapes from him.

The Court: You are willing to concede that this tape was handed to you and by you to the defense counsel as a result of the delivery made to you by Mr. Palliotto? Mr. Palliotto may not have known that this particular tape was in the bundle.

Mr. Caner: That certainly is the fact.

The Court: It is conceded then.

Mr. St. Clair: May we approach the bench?

(Conference at the bench between Court and Counsel as follows:

Mr. St. Clair: We made a rather careful listing of items we were shown pursuant to your order, which I have here, and which does not include this tape. I won't make a point of it unless the Government intends to use this tape as [fol. 351] anything more than a sample.

Mr. Caner: The Government certainly doesn't. But—

Mr. St. Clair: That is the end of it.

Mr. Caner: So far as I know every tape in our possession—

Mr. St. Clair: It was inadvertence on either side then.

The Court: Either it was not turned over or it was not listed properly by Mr. St. Clair. Somebody made a mistake, and maybe both, and I am not saying which.

Mr. Mitchell: It was stuck to another paper.

Mr. St. Clair: No point will be made of it then.

The Court: A pure accident.
Mr. St. Clair: Just an accident then.

(End of conference at the bench.)

Q. You are exonerated.

The Court: Just so the jury may understand—in advance of the trial certain papers were delivered by the Government to the defendant for examination. Apparently this tape got stuck somewhere and was not handed over. It was a mere accident with the best of good will on everybody's part. Mr. St. Clair was just trying to find [fol. 352] out whether there was something queer about it. There is nothing queer about it except some sticky stuff attached to the tape got stuck on some book or something.

Q. At some point while dealing with this shock test, no tapes were utilized, isn't that correct, in conducting the shock test?

A. Yes.

Q. At some point a reading would be taken on the radiosonde audibly and written down on a piece of paper, is that correct?

A. Yes.

Q. And then it would be dropped in accordance with the specifications for the shock test and the operators would take another reading, an audible reading, and write that down on the same piece of paper, isn't that right?

A. Yes.

[fol. 353] Q. And of course, he could see what he had written down the first time and what he wrote down the second time?

A. Yes.

Q. And so could you?

A. Yes.

Q. And you could hear the test and so could he?

A. Yes.

Q. And you could understand the code and so could he?

A. Yes.

Q. When did you change over to using the tape?

A. I would have to check the records to see if I can establish that.

The Court: Go ahead.

Q. Can you establish that from Exhibit B, which is dated in October of 1956?

A. Yes.

Q. Would it have been after that date that you went on to the audible system as distinguished from the tape system?

The Court: Just when did they go from audible to tape, or tape to audible?

Q. Well, as of 29 October you were doing it by tape; is that right?

A. October of what year?

Q. 1956.

A. Yes.

[fol. 354] Q. According to Exhibit B; is that correct?

A. Yes.

Q. Was it after that date that you went on to the audible system in conducting the shock test?

A. There may have been several lots at the beginning where we ran both tape and audible, but after August—

The Court: August?

The Witness: After August 1957 we went on audible means, and used tapes only when the unit was in question.

The Court: By that, you mean when there was a challenge to it?

The Witness: Yes, sir.

Q. So that as I understand it now, you at various times until August of 1957 used either tape or audible interchangeably?

A. No, sir.

Q. You used them both at the same time?

A. Yes, sir.

The Court: Does that mean you had for each instrument both a tape recording, and the impression of the auditor who heard the signals given?

The Witness: I don't quite follow that.

The Court: Well, if for example a ticker operates audibly, and the ticker has a tape, the tape will be one

record, and a person listening who understands the Morse Code will have in his mind a second recording thereof, not one which is visible.

[fol. 355] Now, is it your testimony that prior to August 1957 there was a tape recording of each test and simultaneously there was an auditor, a man listening, or a woman listening, who followed it in his head or her head and understood what was going on as the device was sending out signals?

The Witness: With some of this equipment you could listen to the audible record, but it was not official as far as taking the audible code and marking it down on a record. The tapes were used, and a work sheet associated with it was used, as the final basis for making the decision, sir.

The Court: That doesn't answer the question Mr. St. Clair was putting, and which I tried to supplement.

Q. Let's try it again. Take Lot 1, which we have dealt with. Now, on Lot 1 what is your memory as to the method of reporting the results of the shock test?

A. It is my memory, I think it was by audible means.

Q. Solely by audible means?

A. No, I couldn't swear to that.

Q. What is your best memory?

A. By audible means, and possibility if we had a question, if that lot—

Q. Let's assume one not in question.

A. An audible means.

Q. And only an audible means?

A. Yes.

[fol. 356] Q. And sometime you went on to a recording system wherein you used a tape as well as the audible means?

A. Yes.

Q. Can you fix the time, or the approximate time, when you went on to the tape as well as the audible means?

A. Not the exact date.

Q. No, but the approximate time.

A. I would have to look at the records.

Q. Can you, please?

A. (Witness examines documents.) That would be around the 24th of October 1956.

Mr. St. Clair: I would like to offer for identification this paper.

The Court: Will you just describe it?

Mr. St. Clair: A document green in color, if your Honor please, under the heading Contract 43106-PH-56, dated October 24, 1956, containing a system of blocks and headings on the left margin, pressure, temperature, humidity.

The Court: That is marked Exhibit C for Identification.

(Contract 43106-PH-56 marked Defendants' Exhibit C for Identification.)

Q. Now, I show you Exhibit C for Identification, and ask you if you could tell us what that paper represents?

A. That represents the results of the shock test before and after.

[fol. 357] Q. Before and after what?

A. After being subjected to the shock test.

Q. If you can tell us, whose entries appear on Exhibit C for Identification.

(The witness examines papers.)

Q. No, will you just look at Exhibit C, if you will?

A. On Exhibit C, on this one, I do not see any figures.

Q. I simply asked you if you can tell us whose entries appear on Exhibit C for Identification, if you know?

A. I do not know.

Q. Can you refer to any other papers that are before you to ascertain whose entries they are?

A. No, sir.

Q. This was a regular form, was it not?

A. Yes, sir.

Q. And was this form used throughout the period from October 1956 through November 1956 to record results of the shock test?

A. Essentially so, yes.

Q. And did this form have a name in common parlance around the plant?

A. Yes.

Q. What was the name?

A. The shock test test results.

Q. Is that what you called it?

A. Yes.

[fol. 358] Q. When you wanted to ask your assistant to hand you one of these, you asked him for the shock test test results?

A. Sheet.

Q. This wouldn't be a work sheet, would it?

A. It is a work sheet, yes.

Q. And this is the government inspector's work sheet, isn't it?

A. No.

Q. Well, it says inspector on the bottom, doesn't it?

A. May I see that again?

The Court: I don't quite understand how your answer could be right. You said it is not the government inspector's work sheet. It doesn't belong to the corporation, does it?

The Witness: At the time—

The Court: Does it belong to Standard Coil?

The Witness: Not now, sir.

The Court: Did it belong to Standard Coil?

The Witness: Yes.

The Court: That is their green sheet?

The Witness: Yes, sir.

The Court: Filled out by their employees?

The Witness: Yes, sir.

The Court: Go ahead.

Q. Under your supervision?

A. Yes.

The Court: Now, off the record for a moment.

[fol. 359] (Discussion off the record.)

The Court: I am interrupting the examination to make sure of your answer to a particular question yesterday, and I want you to tell us first what you answered yesterday, and if you want to change it later that is up to you.

The Witness: Yes.

The Court: You will remember that yesterday you were being asked about destroying records at about the time you learned there was an FBI investigation.

The Witness: Yes.

The Court: And I put a question to you, "You are asked whether you destroyed the documents or notes after an FBI investigation to your knowledge had begun. Did you?" What did you answer yesterday, Yes or No?

The Witness: I don't remember exactly what I answered yesterday.

The Court: Well, what is the correct answer?

The Witness: If the question was in relation to destroying records after the FBI investigation, I would have to say Yes. But the records did not pertain to the radiosonde unit.

The Court: You were asked whether you destroyed the documents or notes after an FBI investigation to your knowledge had begun, and your testimony is that you did destroy records, never mind what they are in detail, after [fol. 360] you knew that the FBI was investigating these defendants and this company; isn't that your answer?

The Witness: No, your Honor, I am not positive whether I said Yes in there or not.

The Court: Well—

The Witness: I was asked the question before and after, and I don't exactly know what I did say then.

The Court: What is the truth?

The Witness: The answer would be Yes; I would have to stick by that.

The Court: I don't know how many times I have to say to you that there could be nothing more serious on earth—I am not talking about in heaven—than a criminal trial, there could be no more solemn obligation for any human being than to be called as a witness in a case in which another man's liberty, life, and most precious interests are at stake.

You are reminded of that by being required to take an oath. You take an oath under God, and you swear to tell the truth, the whole truth, and nothing but the truth. Under the circumstances, you may of course pause before you give an answer because you know what weight attaches to your testimony. But you must not be like a weathervane, responding to every gust that goes through your mind.

Mr. St. Clair: Mr. Foreman and Members of the Jury, I show you Government's Exhibit—pardon me, may I offer [fol. 361] Exhibit C for Identification as a work sheet taken from Mr. Palliotto's files.

The Court: Admitted as Exhibit C.

(Defendant's Exhibit C for Identification received in evidence.)

Mr. St. Clair: Mr. Foreman and Members of the Jury, I show you and will pass among you a sample work sheet for the shock test as it appears under date of October 24, 1956, which I think is reasonably self-explanatory.

Q. Now, do you have the tape, sir, that reads after this particular test on these three units for the shock test?

A. I do not have it.

Q. Where is it?

A. I do not know.

Q. Did you destroy it?

A. Possible, yes.

Q. Well, do you have a memory of destroying it?

A. During the course, I destroyed many tapes. I couldn't tell you exactly which one.

Q. Did you destroy any tapes after the FBI investigation started?

A. No, sir.

Q. Did you dispose of any tapes?

A. No, sir.

Q. When did the FBI investigation start, as far as you know?

[fol. 362] A. Sometime in September 1957.

Q. Can you fix a time in that month?

A. No, sir.

Q. Can you fix a week?

A. No, sir.

Q. If you can tell us, did the investigation start, Yes or No, as a result of anything you did?

A. I don't quite follow that question.

The Court: Well, did you make some kind of statement which in your opinion might have been the cause of the FBI investigation?

The Witness: Yes.

Q. When did you make that statement?

A. Sometime in September 1957.

Q. Approximately when?

A. I don't recall now.

Q. The first part of the month or the last part of the month?

A. I still don't recall.

Q. Was it an important matter to you?

A. Yes.

Q. And you still can't tell us even what part of the month it was; is that right?

A. I can't say it was the first of the month or the last of the month.

Q. All right.

[fol. 363] The Court: Now, think for a moment. Do you know what part of the month Labor Day is?

The Witness: Yes.

The Court: Did you have a holiday on Labor Day in the year 1957?

The Witness: Yes.

The Court: Now, don't you know whether you made that statement right after the holiday, or whether you made it much later?

The Witness: It would be after the holiday.

The Court: All right, how much after the holiday?

The Witness: Within two or three weeks.

The Court: Can you do better than that?

The Witness: No, I couldn't establish the exact time, sir.

[fol. 364] Q. Did you make the statement in writing at any time? Just yes or no.

A. Yes.

Q. On what date did you make the statement in writing?

A. Some time in September.

Q. Do you have that writing?

A. No, sir.

Q. Do you have a copy of it?

A. No, sir.

Q. Was this a matter of importance to you, I ask you again?

A. Yes, sir.

Q. It was not just something off the cuff, was it?

A. No, sir.

Q. Do you have every tape from September and thereafter that was made at this plant?

A. No, sir.

Q. What happened to the tapes after September that you do not have?

A. The tapes were destroyed.

Q. By whom?

A. By myself and other Quality Assurance Representatives.

The Court: At your direction?

The Witness: Yes.

The Court: Now, Mr. Palliotto, is it possible that an employee who was then in Class 11—is that right?

[fol. 365] The Witness: Yes.

The Court: —didn't have a record of what he did in communicating to another Government agent in writing? Have you no carbon?

The Witness: No.

The Court: Did you have a secretary at that time?

The Witness: Yes.

The Court: Did she make a carbon of this letter?

The Witness: No.

The Court: Did you dictate the letter to her?

The Witness: No. Verbally—

The Court: Did you make an oral statement to the FBI?

The Witness: To the FBI? No, it was a written statement.

The Court: Did you write it at home?

The Witness: I don't recall, sir, where I wrote it. It may have been at home.

The Court: Are you in the habit of writing statements to the FBI about Government employees or contractors or others?

The Witness: No, sir.

The Court: Wasn't this a very extraordinary thing for you to do? I mean "extraordinary" in the sense that it was not your usual course of business.

[fol. 366] The Witness: I know I wrote—

The Court: I do not mean "extraordinary" in the sense of criticism. But wasn't it out of the ordinary?

The Witness: Yes.

The Court: Had you ever done it before?

The Witness: No.

The Court: Have you ever done it since?

The Witness: No, sir.

The Court: When you wrote such a letter did you write it by hand?

The Witness: Yes, sir.

The Court: Did you keep a copy?

The Witness: No, sir.

The Court: Wasn't it unusual to write by hand to the FBI when you are a Government employee and have a secretary?

The Witness: No, sir. I wrote by hand a report which was given to the FBI, and I wrote that in long hand, sir, and I signed the statement.

The Court: Did the FBI agent come around to see you?

The Witness: I saw him several times, sir, and I saw him at his office.

The Court: When you were there did he show you your signed original communication?

[fol. 367] The Witness: He showed me the statement and I signed it.

The Court: I am sure of that. But did he show you your original long hand letter?

The Witness: No. The original long hand letter, he took dictation from me, and wrote out a letter himself, based on the information—

The Court: I direct the Government to produce the original long hand letter.

Mr. Caner: There is this document (handing document to the Court).

The Court: I have in front of me a document dated September 16, 1957 written from Providence, Rhode Island,

which obviously is not the original document because this is a statement made in the presence of the FBI. I asked for the letter before that. Do you have that?

Mr. Caner: No, your Honor.

The Court: Please make inquiry of the FBI at once during the recess, because it is quite obvious that this witness has testified, either accurately or inaccurately, that he wrote a letter which led to the statement which I have in my hand and which I mark for identification only at this stage as Court's Exhibit 1 for Identification. This is the letter that was just handed to me by Mr. Caner, and it begins September 16, 1957 and it suggests that, if [fol. 368] your testimony is correct, Mr. Palliotto, that you wrote a letter prior to September 16, 1957 because, as I understand it, you did not talk with the FBI and make a formal statement to the FBI, such as the one I now have in my hand, until they had received from you a handwritten letter.

The Witness: I probably can straighten the matter out. I think at the first instance, I visited the FBI office with another personnel from the Signal Supply Agency.

The Court: I don't know who "another personnel" is. With whom?

The Witness: Mr. Young.

The Court: Who is Mr. Young?

The Witness: He is from the Provost Marshal's office, United States Army Signal Supply Agency.

The Court: Is he a civilian or military officer?

The Witness: He is a civilian.

The Court: Yes. You and he went where?

The Witness: To the FBI office in Providence.

The Court: In Providence?

The Witness: In Providence.

The Court: You went from California to Providence?

The Witness: No, sir, from North Dighton, Massachusetts to Providence, Rhode Island.

The Court: All right. Had you written the letter before you went there?

[fol. 369] The Witness: Not to the FBI.

The Court: Did somebody else? Do you realize how inconsistent your testimony has been in a period of 15 minutes?

The Witness: Yes. But I am trying to remember exactly the circumstances and the things that I did at that particular time.

The Court: We want you to think about them and remember that every word you use is, as long as court records last, imperishable.

The Witness: Yes, sir. I realize that.

Q. Does the—

Mr. St. Clair: May I?

The Court: Yes.

Q. Does the date September 16, appearing on Court's Exhibit 1 for Identification, refresh your recollection as to when you first raised this question with any other public official?

A. Yes.

Q. What is your present memory?

A. Some time between the 6th and the 9th of September.

Q. Within that three-day period?

A. Yes.

Q. Did you destroy any tapes for the temperature calibration test following the 9th of September, 1957?

[fol. 370] A. Yes.

Q. Did you destroy tapes from the humidity calibration test following September 9, 1957?

A. Yes.

Q. And pressure calibration test tapes?

A. Yes.

The Court: The jury is excused.

(The jury leaves the court room at 10.55 a.m.)

The Court: If there is any press reporter in the court room what I now say is of course subject to being reported after the trial is over, but I want to be very clear it does not get into the newspapers during the trial. I shall treat it as a contempt if it gets into the newspapers due to the deliberate defiance of my instructions. So I now am telling all of you that of course at an appropriate later time you can say what you like about what goes on now but you are not to say it to anybody for the pur-

pose of it being reported in a newspaper during the trial because I do not want what I am going to say to reach the jury under any circumstances.

First of all, I am going to ask Mr. Caner and Mr. Mitchell: is there any other principal Government witness with respect to the kind of items which have been covered by the witness on the stand, Mr. Palliotto?

Mr. Caner: There is one, yes, your Honor.

[fol. 371] The Court: Is he one whose credit in your opinion will stand better after examination than this witness' credit?

Mr. Caner: I think his credit will be good, your Honor.

The Court: I didn't ask you that.

Mr. Mitchell: Your Honor, I think that Mr. Palliotto is just a little confused.

The Court: A little confused? This has gone on for two or three days. I am going to tell you that if I were the United States Attorney in this case and my principal witness were testifying as this witness has done I would forthwith nol prosse the case.

Mr. Caner: If the Court please, this witness was put on to testify simply to give explanatory material. This witness was not put on at this stage to testify to any matters concerning the fraud. It may be, and it obviously is, that his explanations have not been as clear as they might be. But, if the Court please, he is not our principal witness by any stretch of the imagination.

The Court: There are all kinds of character in a lawyer. One of them is the kind of character which enables him to realize in what situation a witness for whom he is not responsible has placed his case, and it is the responsibility of the United States Attorney and his assistants to reflect [fol. 372] whether the great interests of justice, which are their primary concern, are served by a prosecution which depends upon a witness of the character that this witness has revealed on the stand.

I will take a 15-minute recess for the purpose of enabling the United States Attorney and his assistants to consider whether the public interest is served by a further prosecution of this case.

(Recess.)

[fol. 373] (Jury excused.)

(Conference at the bench at which the following was recorded:)

The Court: I note that Mr. Richardson has joined the government counsel, and I am going to undertake very briefly to state to him as well as to other counsel why I have done the, for me, entirely unprecedented thing of asking the United States Attorney to consider whether to nol pros the case at this stage.

The cold record perhaps inadequately conveys the total picture as it has developed in the last few days of testimony, and in particular the testimony of the witness Palliotto, who is on the stand.

A judge ought not to deceive himself into believing that he knows how a jury will act. Yet I feel reasonably confident, and I believe my confidence is shared by Mr. Duwan, the Clerk, who has sat through the trial and who is, like myself, a neutral and a person of some experience in the court, that there is no chance whatsoever that this jury would convict these defendants if a conviction required any [fol. 374] credit of Mr. Palliotto.

I make no statement as to whether the defendants are guilty or not guilty, and I will make it clear that I am in no way casting any reflection on the United States Attorney or any of his assistants, including most specifically Mr. Caner and Mr. Mitchell. I am not doubting any of the proceedings before the Grand Jury. I am looking merely at the situation in which this Court and Jury are presented with the testimony of a man who may intend to tell the truth but seems absolutely incapable of so testifying as to persuade neutral persons that he has a mind with a discriminating capacity to observe, the strength to remember, the skill to narrate, and the total awareness of the proceedings in which he, and more particularly the defendants, find themselves.

If it were not so serious a matter, it would be humorous to refer to the kinds of things which this witness has said. On one occasion he will give an answer in the affirmative,

and a few minutes later when the situation is really not [fol. 375] changed in any respect he takes a diametrically opposite position. He seems not to realize the ambiguity his testimony has created. He seems to be unresponsive to repeated warnings by the Court that there could be no more serious matter than the offering of testimony in a criminal case, and that the witness should pause and reflect if he is in doubt, but should not plunge himself and the rest of us into a series of confusions.

So far as his narrative ability goes, he has been responsible for some of the most humorous blunders that I remember. He referred to the signals which were being given by Exhibit 1, the radiosonde, as "spurious." What he meant, as it finally developed, was that they were signals which were given on the spur of the moment, that is to say, instantaneous. The misuse of the word "spurious" in a case in which one of the important allegations in the indictment is that there were frauds committed upon the government in connection with the testing system, rises to a degree of risk to the defendants to which they ought not to have been subjected.

[fol. 376] I am not in any way intimating that this was the fault of the United States Attorney or his assistants. It just stands as a dramatic instance of the unawareness of the witness as to what his testimony means in a case like this.

Again a strange misuse of language, which I think did not prejudice, was his reference to "virgin women's hair," by which he meant the hair of a woman which was not dyed.

A witness who has so little understanding of the language and who has so frequently made utterances which have confused the Court, and I feel quite certain the Jury, is a very slender reed on which to make a man's fate depend.

Now, I know I have heard only four days of testimony, and I am aware that sometimes, as Thomas Dewey as District Attorney illustrated, one must secure convictions on the testimony of prostitutes, pimps, and worthless people. One may have no choice but to proceed on the basis of persons of poor character and worse reputation. But in [fol. 377] general when such convictions have been secured

they have been because though men and women have been worthless outside the court room, they have seemed to be creditable or worth believing in the court room.

I can't feel that any trust could be placed in this witness, and if in the end the Jury did believe this witness, I think it would be almost inevitable that I would have to set aside the verdict as not being a verdict which could be granted full credit as being a verdict based upon evidence beyond a reasonable doubt.

Mr. Duwan, have I really overstated your position? Never mind whether you agree with every paragraph I have said, but have I overstated your position?

Mr. Duwan: No, not at all.

Mr. Richardson: May I comment briefly before I ask Mr. Caner to comment on the basis of his more detailed knowledge of the government's case?

I think in the first place we should make it clear that this witness was called for a limited purpose not central to establishment that wrongdoing had occurred. As I un- [fol. 378] derstand his testimony, it was to have attempted to explain the nature of the tests that were to be used under the terms of the government's contract on procuring these radiosondes.

The government would rely entirely on other witnesses to show that those tests were not carried out, and in fact they were falsified.

We believe, therefore, that whatever the Jury's impression of this witness generally, that its judgment as to whether the defendants are guilty would and should rest upon testimony of witnesses who will testify that under the instructions of the defendants they did not follow the procedures prescribed and that they in fact falsified those procedures.

Would you like to supplement that, Mr. Caner?

Mr. Caner: I would like to say that I think the case could well have proceeded by introduction of the documents, particularly the specification, which set forth the test procedures, and then the fraud witnesses could have been called. My purpose in calling Mr. Palliotto was to ex- [fol. 379] plain just how primarily the testing procedures were supposed to work, because it did not seem to me that

by just simply reading the printed document the Jury could understand how the test procedures were supposed to be operated.

The Court: Mr. Caner, you are not on trial. I don't want you to think I have made any criticism of the way you choose to present the matter.

Mr. Caner: I don't infer that. I address myself to the point that this witness' testimony is not material to anything relating to the fraud charged in this case. The witness was called to explain it. He has not done a good job of explaining, I grant you that, but the specifications themselves set up the procedure. I think that at least the way the test was supposed to have been operated has been explained, perhaps not perfectly, but it has been explained, and even if it hasn't been explained it is set forth in the specifications.

This witness was not to be our primary witness. I had not anticipated by any stretch of the imagination that he [fol. 380] would take this long. The fraud witnesses are here, they have been here for many days, they are the ones who will prove the case against the defendants.

The Court has not heard one-tenth of the testimony in this case, and none of the fraud testimony. I do not think that this witness' testimony has to be believed in any degree in order for a conviction to stand, because the documents, as I say, do speak for themselves as to the test procedure, although not well enough to instruct the Jury, not knowing the instrument, just how test procedures were conducted.

Therefore, it is my view that the witness' testimony is not material to the fraud, and that I would be derelict in my duty in not proceeding with the case.

Mr. Richardson: I might add that I did keep in fairly close touch with the presentation of this case to the Grand Jury, and would simply like to underline in the light of that degree of exposure to the case that what Mr. Caner says about the importance to the government case of the fraud witnesses who have not yet been heard, is basic, and [fol. 381] I therefore feel that to draw a conclusion based upon the testimony of this witness would not fairly give the government an opportunity to present to the Court

and Jury the evidence on which the Grand Jury proceeded in charging these defendants.

The Court: I want to make it absolutely clear that I am going to allow the government to go ahead. I want further to make it absolutely clear that neither now nor previously have I intended to suggest that the defendants are innocent or not guilty. Neither now nor previously have I intended to suggest that the Assistant United States Attorney, Mr. Caner, or the Assistant United States Attorney, Mr. Mitchell, or anybody else, has been at fault or negligent, or failed to exercise such professional skill as the case required.

All that I have said is that regardless of what other witnesses testify with respect to the merits of the alleged fraud, I do not believe that there is a chance that this Jury will convict these defendants, and that you can suppose that Mr. Duwan and I have at least sat often enough [fol. 382] in criminal cases to know that whether the United States Attorney was innocent or not, whether he was skilful or not, the impression created is now ineradicable in our view. Isn't that right, Mr. Duwan?

Mr. Duwan: So far.

Mr. Richardson: With full deference to Mr. Duwan, and conceding that a jury asked now to vote—

The Court: I didn't say asked now. I am talking about whether it will be overcome.

Mr. Richardson: I think they may feel when they have heard the fraud witnesses that the perspective that they then have on the testimony of this witness is totally different.

The Court: The unfortunate thing from the government's point of view is that this witness has been on the stand now for four days. No one can overlook the fact that in spite of all instructions to jury, they don't hold their minds in absolute suspension, and no one can think the judges do.

[fol. 383] Mr. Richardson: I might say in that connection that it had never been anticipated by the government that a witness called for such a purpose would be on the stand for this length of time, and in our view a great deal of the

testimony that has been elicited during that period is not material to the government's case.

The Court: In my view the difficulty there would require me to make a professional comment, which I would rather not do, but I invite you to read the transcript.

Mr. St. Clair: The matter of procedure raises its head. I haven't examined this witness at all on any alleged fraud, because it was represented to me that he would be recalled for that purpose as a government witness. Now, if I understand he is not to be recalled for that purpose, I am going to spend the next couple of days with him on what he alleges was the fraud, because he was the government man in charge.

The Court: That is quite correct. You were told, as I was told, that the witness would be called twice, once in [fol. 384] connection with what was more or less background of the whole testing procedure, and once with respect to specific knowledge of specific fraud.

Mr. Caner: Yes, and we propose to do that, your Honor.

Mr. St. Clair: Then he will be called later with respect to the alleged fraud?

The Court: Yes. I am glad that the transcript is being typed out currently.

Mr. Richardson: I will look at it with interest, your Honor.

The Court: All right, bring the Jury down.

(The Jury returns to the court room.)

The Court: You may continue with the cross-examination, Mr. St. Clair.

Mr. St. Clair: Thank you, your Honor.

Q. Now, Mr. Palliotto, if we may, let's return to the temperature test. I wonder if you could tell me whether or not there was a dial of some description on the temperature control station located as I am indicating now on Exhibit 4, immediately in front of the symbol for single head recorder on the second line?

A. Yes.

[fol. 385] Q. That is, in order to record the temperature there was not a thermometer, as we might generally suppose; is that correct?

A. Yes.

Q. That is, a glass with mercury or colored alcohol in it; is that correct?

A. Yes.

Q. It was in fact a meter of some description, and I will draw, if I may, a very rough sketch, and ask you if that is a fair representation of the type of meter that was used by the operator in the temperature control station?

A. Yes.

Q. Now, there was, was there not, a tolerance within which the operator conducting the government test could read the temperature, say at minus 50 degrees?

The Court: You will have to state for the record a description of that meter. Otherwise, an appellate court won't know what you are talking about.

Mr. St. Clair: I will in just a moment.

The Court: All right.

Mr. St. Clair: Would you read the question to him?

(The question was read.)

The Witness: Yes.

[fol. 386] Q. That tolerance was plus or minus two degrees, was it not?

A. Yes.

Q. In other words, the total of 4 degrees Centigrade, any reading within that would be acceptable as minus 50 degrees Centigrade?

A. I don't quite follow the question.

Q. You had a tolerance of plus or minus two degrees at each point on the temperature calibration test, did you not?

A. Yes.

Q. That would be at minus 50 degrees, minus 30 degrees, minus 10 degrees, plus 10 degrees and, well, plus 30 is the 0, isn't that right?

A. Yes.

Q. Plus or minus two degrees really means 4 degrees, doesn't it?

A. Yes.

Q. That is, if I have a point here, and I indicate on the

board, which is 50 degrees, I can go two degrees this way or two degrees that way, can't I?

A. Yes.

Q. Anything within 4 degrees of 50 degrees would be accepted as 50 degrees?

A. No, sir.

Q. It wouldn't. All right. Was there any tolerance, according to your understanding, that was permissible?

[fol. 387] A. Yes.

Q. In the reading of the temperatures in the temperature calibration test?

A. Yes.

Q. What was it?

A. You could take the reading at 50 degrees, plus or minus two degrees, any point therein, and the thing had to be stabilized to 2/10 of a degree at the point where you were reading.

Q. By stabilizing at 2/10 of a degree, what you mean is that it will not change by more than 2/10 of a degree over a period of time, isn't that right?

A. Yes.

Q. And it is 2/10 of a degree per minute?

A. Yes.

Q. Supposing it read 51 degrees, this meter which I will describe in a moment, if this meter read 51 degrees and it stayed at 51 degrees for a half hour, that would be stabilized, wouldn't it?

A. Yes.

Q. It would be within the tolerance allowed, would it not?

A. Yes.

Q. And it would be treated for all practical purposes as minus 50 degrees?

The Court: Minus?

[fol. 388] A. No, sir.

Mr. St. Clair: I am dealing with minus 50 degrees. So let us start again, if I may. Your Honor is quite right.

Q. If I had minus 51 degrees on the meter—right?

A. Yes.

Q. —and it stayed there for a sufficient time to be stabi-

lized, that would be within the tolerance, would it not, for minus 50 degrees?

A. Yes, sir.

Q. This meter I have sketched on the blackboard is a rather squarish outline, is it not?

A. Yes.

Q. Is that a fair representation of the meter in actual use?

A. Yes.

Q. About how large was it on its sides, if you can tell, how many inches?

A. About six inches wide and about five inches long.

Q. And it had a white background, I guess, with black letters and black marks?

A. Yes.

Q. How many degrees did it cover?

A. I don't recall at the present time.

Q. You recall it covered a total of two degrees, don't you?

[fol. 389] A. No, I couldn't swear to it.

Q. Don't you know it covered one degree each side of the center?

A. I couldn't swear to that.

Q. Is it probable that that is so?

A. It is probable.

Q. You were there for more than a year, weren't you?

A. Yes.

Q. You were watching these tests day after day, weren't you?

A. No, sir.

Q. Well, someone under your supervision was watching them?

A. No, sir.

Q. You want us to believe that you never watched the tests?

A. No, sir.

Q. You watched, didn't you?

A. Some tests.

Q. On numerous occasions, didn't you?

A. Yes.

Q. You now say that the best you can do is that it was probable that the meter covered only a total of two degrees?

A. That is the best answer I can give.

Q. That is the best you can give. That is the best you will do for me, is that right?

A. Yes, sir.

[fol. 390] Q. All right. The meter could be set by the operator to be centered on minus 50 degrees, could it not?

A. Yes.

Q. That is the center mark, as I am indicating on this small sketch, would be representative of minus 50 degrees?

A. Yes.

Q. And probable one degree to each side of it?

A. I don't quite follow the last question.

Q. Well, the right and left boundaries of the scale on the meter probably, you say, represented one degree each side of minus 50 degrees?

A. Yes.

Q. Then it could be changed so that it would next read or center on minus 30 degrees, isn't that right?

A. Yes.

Q. There would be no way you could tell any temperatures between plus or minus one degree from minus 50 degrees and plus or minus one degree from minus 30 degrees?

A. No, sir.

Q. It could be changed again to read minus ten degrees, plus or minus one degree on each side of that, isn't that right?

A. Yes, sir.

Q. And so forth through plus ten degrees Centigrade?

A. Yes.

[fol. 391] Q. And plus 30 degrees Centigrade?

A. Yes.

Q. In so far as an operator of the meter was concerned, she could only or he could only tell within one degree what the temperature was inside the temperature control box, isn't that right?

A. Yes.

The Court: Have I correctly understood you to say that the meter was so arranged it couldn't show the maximum permissible tolerance?

The Witness: I don't recall exactly the limits.

The Court: That is the effect of your testimony.

The Witness: I don't recall the limits on the meter right now.

The Court: You have told us that you couldn't say it was as much as one degree, and you told us that the tolerance on each side was two degrees. Now just plain and simple mathematics would tell you that one is less than two. If two is the tolerance and the meter shows only one, the meter does not show the permitted tolerance. Is that your testimony?

The Witness: It does not, sir, that is right.

The Court: It does not show the permitted tolerance.

Q. Let us pass, if we may, Mr. Palliotto, to the humidity [fol. 392] test. Incidentally, did you have anything to do with the design of these instruments?

A. No, sir.

Q. You could have changed them at any time if you wanted, couldn't you?

A. No, sir.

Q. They were Government property, at least while they were being used for Government test? You knew that?

A. I'm not positive, sir.

Q. It has been stipulated in court. Will you accept that, Mr. Palliotto?

A. Yes.

Q. Thank you. Now let us turn, if we may, to the humidity test. In conducting the humidity test, first of all, it would be conducted at the humidity chamber designated as Station No. 13 on Exhibit 4, approximately two-thirds of the way across the top of the exhibit. Isn't that correct?

A. Yes.

Q. And the controls for Station 13 are in the box immediately to the left of Station 13 entitled Humidity Control, is that correct?

A. Yes.

Q. And that is a table, I take it, of some kind?

A. Yes.

Q. Upon which, it is indicated, there is located a multiple [fol. 393] head recorder?

A. Yes.

Q. And there was a multiple head recorder, was there not?

A. Yes.

Q. So that we have an understanding of what a multiple head recorder is, is it fair to suggest that it is substantially the same as Defendants' Exhibit A, except that it is so constructed as to mark a wider tape with more than one mark at the same time?

A. Yes.

Q. And we have here, I believe, as a sample an exhibit representing the size of tape that is used on a multiple head recorder, Exhibit 14. We can take any one of them. I show you Exhibit 14 for Identification, it is so marked, and 13 for Identification and 12 for Identification, and ask you if you can tell us whether any of those three tapes so-called represent—

Mr. Caner: Excuse me, your Honor.

The Court: Just a moment.

Mr. Caner: If the Court please, I believe those tapes were offered as exhibits—as samples.

Mr. St. Clair: I believe so, too. They are just marked for identification, and I will bring them over to Mr. Duwan and he can erase that.

The Court: Excuse me. I think they have actually been [fol. 394] admitted as samples. They are, therefore, exhibits. They may be exhibits which the Government has offered for a particular and limited purpose. They may be offered for another purpose, for the contents of the matter, and then the purpose of the exhibits must be broadened but they are still exhibits.

Mr. Caner: Yes. They are marked apparently only for identification.

The Court: I think they are now all in evidence, are they not?

The Clerk: I have them marked for identification.

The Court: Which ones are they again?

Mr. St. Clair: 12, 13 and 14.

The Court: I have my notes, and I have crossed out in my own notes the words "for Identification" with respect to each one of them. The record will show that I said that publicly. There is no reason for any counsel to sigh as though I were doing something extraordinary.

Q. From these exhibits, sir, Nos. 12, 13 and 14, could you help us by telling us which, if any, one of those represented the tape on the multiple head recorder used in connection with the humidity calibration test?

A. Both of these (indicating).

Mr. St. Clair: The witness is handing me, if your Honor please, Exhibits 13 and 14 as being representative of the [fol. 395] tapes, the multiple head tapes that were used in connection with the humidity calibration test.

Q. Is that correct?

A. Yes.

Q. And Exhibit 12 is not a representative type of tape for that test?

A. No, sir.

Q. And in all fairness to you, it is representative of the tape for some other test?

A. Yes.

Q. Thank you. In general, as I understand it these tapes were produced in substantially the same manner and handled in substantially the same manner as you have already described with respect to the tapes produced and handled in connection with Defendants' Exhibit A?

A. Yes, sir.

Mr. St. Clair: Mr. Foreman, members of the jury, these are representative samples of the humidity type test.

The Court: Louder, please.

Mr. St. Clair: These are representative samples of the tape used in the conduct of the humidity calibration test, as the witness has described it. Would you please pass that among you (handing tapes to the Foreman of the jury).

Q. As I understood your testimony yesterday, prior to the actual testing of the calibration of the units for humidity [fol. 396] you would annex the hair elements, or would they already be annexed?

A. They would be annexed.

Q. I am sorry. You are quite right. That is, when they were submitted to the Government at the point between 8 and 14, shown in Exhibit 4, they were complete, they had the hair elements on them?

A. Yes, sir.

Q. In conducting the humidity test, how long did it take to conduct the test?

A. The conditioning period and the test would be approximately about 8 to 9 hours.

Q. That is from the moment someone commenced to conduct the Government humidity calibration test until it was completed it would be a period of 8 to 9 hours?

A. Yes.

Q. How many units were tested at the same time?

A. Five.

Q. I take it that part of the test consisted of reconditioning so to speak of the hair elements?

A. Yes, sir.

Q. They were put back into a chamber in control conditions again of 80 degrees Centigrade and 90 per cent humidity?

A. Yes, sir.

Q. Is that the same chamber that the contractor used to [fol. 397] condition the hair elements?

A. Yes, sir.

Q. So that in this chamber at the same time there would be the contractor's hair elements and the Government units for test, is that right?

A. Yes.

Q. Would there be occasions when that chamber would be opened by the contractor to get out his hair elements?

A. Yes, sir.

Q. And would these sometimes be left overnight?

The Court: What are "these?"

Mr. St. Clair: I am sorry.

Q. Would your units be stored overnight sometimes in this humidity chamber?

A. Yes, sir.

Q. And so would the contractor's hair elements, right?

A. Yes, sir.

Q. Was there any division made within the chamber to segregate the Government's units from the contractor's hair elements?

A. There was.

Q. Was there ever a time to your knowledge when the contractor's side so to speak was full and it had to use the Government's side to store its hair elements?

A. Yes.

[fol. 398] Q. And of course under those circumstances the contractor was permitted to get its hair elements out of the chamber as necessary, wasn't it?

A. Yes.

Q. With your knowledge?

A. Yes.

Q. With your consent?

A. Yes.

Q. This sometimes would happen on the night shift, wouldn't it?

A. I couldn't say anything about the night shift. I didn't work nights.

Q. You didn't work nights. All right. The company men worked nights, didn't they?

A. Yes.

Q. They had to get hair elements out at night, didn't they?

A. Yes.

Q. You knew that?

A. Yes.

Q. Thank you. Now let us turn, if we may, to the pressure test. The Government pressure calibration station was conducted at what point on Exhibit 4?

A. At Point 12, which is the first row, at about the center of the top.

Q. At Point 12. I am now indicating on Exhibit 4. It is [fol. 399] entitled Ambient and Cold Pressure Chamber, is that correct?

A. Yes.

Q. That chamber was controlled by the station immediately to the right of Station No. 12 entitled Pressure Control, is that right?

A. Yes.

Q. I am now indicating here on Exhibit 4, on this pressure control station, just to the right of No. 12, there is indicated a device known as a manometer. That is another word for barometer, isn't it?

A. Yes, sir.

Q. Is there any reason why you used the words manometer and barometer over here in the upper left-hand corner?

A. I can't recall right now.

Q. All right. We lay people can understand that it is a barometer, right?

A. Yes, sir.

Q. There is a so-called standard barometer available on the floor, and it is indicated as the Item B on Exhibit 4 in the upper left-hand corner, isn't it?

A. Yes, sir.

Q. There is also a barometer or manometer, if you will, on Station No. 5, where the contractor conducted its initial pressure calibration?

A. Yes, sir.

[fol. 400] Q. The barometer on the contractor's location, where it conducted its calibration, which is Station 5 on Exhibit 4, was adjustable, wasn't it?

A. Yes, sir.

Q. The manometer so-called, used by the Government at the pressure calibration control station, was not adjustable, was it?

A. No, sir.

Q. In cold days there would be an error in the barometer, wouldn't there?

A. I don't recall, sir.

The Court: That is not the question. It really is a question addressed to you in your capacity as a scientist.

The Witness: No. I couldn't answer that truthfully.

The Court: You don't know?

The Witness: No. I couldn't. I'm serious on that. I couldn't answer that, whether it would be affected by the cold.

Q. Why was there a standard barometer around, Mr. Palliotto?

A. To check the manometer and other barometer with the standard to see that it didn't deviate.

Q. Because there would be occasions when it would deviate?

A. Yes.

[fol. 401] Q. In all fairness to me that would be on extremely cold days, wouldn't it?

A. That is possible.

Q. Is it only possible or isn't it probable?

A. I couldn't truthfully answer that.

Q. We are only asking you to be truthful of course. You don't know?

A. I don't know.

Q. You do know there was some reason to check these things?

A. Yes.

Q. The Government's manometer was not checkable, it was not adjustable, you have already told us. Isn't that right?

A. Which manometer is that?

Q. The Government manometer.

A. We have two. The barometer or manometer? The manometer?

Q. I am talking about the monometer, as shown on Exhibit 4, adjacent to Station No. 12. You have already told us it was not adjustable.

A. I don't quite follow the questioning.

Q. Maybe I don't want you to follow it too closely. But just answer the question.

The Court: What did you mean by that?

Mr. St. Clair: I'm sorry. It was a gratuity on my part that I would just as soon withdraw, your Honor.

The Court: The jury will disregard that.

[fol. 402] Mr. St. Clair: I would just as soon withdraw it, your Honor.

Q. You have already told us that the manometer used in the Government control station was not adjustable. Do you recall that?

A. I didn't make that statement.

Mr. St. Clair: Would you mind turning back, Mr. Reporter, and reading that?

The Court: Read back the record for the last five minutes.

Mr. Palliotto, your testimony is here being presented in connection with a criminal trial in which the liberty of two

individuals is at stake. It is important that you should answer as accurately as you can and as consistently as your memory will permit.

(The previous testimony of the witness, as requested, read by the reporter.)

[fol. 403] Q. Did you hear your testimony read to you, Mr. Palliotto?

A. Yes.

Q. Do you recognize that at one point you said the manometer was not adjustable, and at a second point you said it was adjustable?

A. Yes.

Q. Which is it?

A. It is adjustable.

Q. Now you say it is adjustable?

A. But not by the operator.

Q. Whoever is operating it can't adjust it, in other words?

A. That is right, sir.

Q. If there is an error in it, the operator is left to her own devices?

A. No.

Q. Well, she can't adjust it?

A. That is right.

Q. How long a job is it to adjust the government manometer?

A. It all depends on the circumstances causing the deviation.

Q. Supposing it is cold weather?

A. It may be a couple of minutes or so. I couldn't answer that truthfully, because I don't recall the process right now.

Q. Do you recall it ever being adjusted?

A. Not by the operator, no, sir.

Q. I am not asking you by anybody. Did you ever recall [fol. 404] anybody adjusting it?

A. Yes.

Q. When?

A. During the course of the contract.

Q. Well, the contract ran from October 1956 to March 3, 1958. How many occasions during that time do you say you

observed or have knowledge of the government manometer being adjusted?

A. Several times.

Q. As many as fifty?

A. No, I couldn't say that.

Q. More than fifty?

A. No.

Q. Less than fifty?

A. Yes.

Q. More than twenty-five?

A. I couldn't possibly state.

Q. You haven't the slightest idea, you mean?

A. No, I haven't.

Q. Well, do you really know whether it was ever adjusted?

A. Yes, I saw him adjusting it on several occasions.

Q. Who?

A. The technician assigned to—I don't recall his name, but he was assigned to the repair section for Standard Coil Products.

The Court: If you cannot recall the name, will you give us a description of whether it was a man or a woman, the [fol. 405] approximate age, and anything else that may help the defendants know of which you are speaking?

The Witness: Well, it was a man, a young fellow, roughly —you want a description of him, sir?

The Court: Yes.

The Witness: I would say he was a college boy, going to college, and I don't recall whether he had wavy hair or not.

Q. Is that the best you can describe him?

The Court: Would you know his name if it was put to you?

The Witness: No, sir.

Q. But he worked on the government manometer on occasions?

A. Yes, sir.

Q. He was summoned in by you or one of your assistants?

A. I don't recall who summoned him, whether it was myself or my assistant or someone else.

Q. As far as you know, did he make the adjustment properly?

A. Yes.

Q. Did you ever make any complaint to anybody that he did otherwise?

A. No, sir.

Q. In any event, the operator was not competent to do such a job, correct?

A. I don't—I couldn't answer that Yes or No.

[fol. 406] Q. Well, just a moment ago you said that she wouldn't or he wouldn't, didn't you?

A. Yes.

Q. Again, Mr. Palliotto, which is it? It is important. It is very important, I can assure you of that. Now, which is it?

Mr. Caner: If the Court please, the first question—this question is whether the operator was competent to adjust it. I don't believe that question was put previously.

The Court: I think the question did include competence. You may go back and read it.

(The previous testimony was read.)

(Discussion off the record.)

The Court: Now, Mr. St. Clair and I think Mr. Caner are agreed that we want your testimony as to whether the operator had that degree of skill and competence which made it within the range of that operator's technical ability to check.

Q. Can you help us on that, Mr. Palliotto?

A. The operator could check.

The Court: Could or couldn't?

The Witness: Could check the manometer, to see if it was off calibration.

Q. And if it was off, could the operator readjust it?

A. It all depends, the condition of what—how far off it was, and the conditions leading to it.

Q. Sometimes Yes, and sometimes No; is that correct?

[fol. 407] A. Yes.

Q. So there would be occasions, then, when it was necessary to call in somebody else to adjust the government manometer; is that right?

A. Yes.

Q. Now, the company manometer, or barometer if you will, at Station 5—

The Court: Well, I would like to know for certain, does it make any difference which of these terms Mr. St. Clair uses?

The Witness: It doesn't to me, sir.

The Court: Is there a technical difference between them, or are they synonymous?

The Witness: No, one is a standard; it is set there and you don't touch it.

The Court: Which is that?

The Witness: That is the standard barometer. And the manometer is an instrument you can control in relation to the pressure at levels—it goes up and down, and scales on it that you can read what you want to read at certain levels.

The Court: Then, as I understand the question, you had better not use the word barometer hereafter.

Mr. St. Clair: I understood they were the same.

The Court: Well, evidently they are not.

Q. Well, what was the instrument at Station 5 used by [fol. 408] the contractor, a barometer or a manometer?

A. I am trying to remember. It was a gauge but—

The Court: No, no. Think. Was it one or the other, or neither?

The Witness: To my knowledge, it was neither.

Q. What instrument was used, if you know, by the contractor in calibrating the radiosondes for pressure?

A. At Position 5, sir?

Q. At Position 5, yes.

A. He had a gauge with a mercury column, and if my memory serves me right I think there was numerals on the side distinguishing the level that that mercury column had risen to, or was at that particular time.

The Court: I am going to interrupt you, because you used the word "we" as the pronoun. Didn't you mean Standard Coil Products Company, not "we"?

The Witness: Right, sir.

The Court: Well, please, since a great deal seems to turn on whether something is a government or a corporation activity, be careful about your pronouns and antecedents. As I understand it from that last answer, the word "we" means Standard Coil; is that right?

The Witness: No, sir.

Mr. Caner: "He," referring to the operator.

The Court: I am sorry. I beg your pardon.

[fol. 409] Q. In substance, have you described the barometer to us, as you understand the term?

A. Yes, it is a form of a barometer.

Q. And that form of barometer was readily adjustable, wasn't it, if you know?

A. I believe so.

Q. Far more readily adjustable than the manometer used by the government on its test?

A. I wouldn't know on that, sir.

Q. Now, the radiosonde has in it a red—it looks like a phonograph record in parts, does it not?

A. Yes.

Q. And referring now to Exhibit 1-A, that is this red circle that I am now pointing to with my finger.

A. Yes.

Q. That is this record here (indicating). This portion of it between my thumb and forefinger is raised, is it not?

A. Yes.

Mr. St. Clair: And, Mr. Foreman and Members of the Jury, between my thumb and forefinger is a portion of this phonograph record, so to speak, that is raised.

The Court: That is about 25 per cent of the total surface?

Mr. St. Clair: I think it is probably a little—yes, 25 per cent.

[fol. 410] Q. And in that raised portion it has grooves in it, doesn't it?

A. Yes.

Q. And it is only that portion that has grooves in it?

A. Yes.

Mr. St. Clair: I don't know whether it has been passed among you.

The Court: No, I think not.

Mr. St. Clair: Perhaps you might be instructed if you look at it now (handing to Foreman).

Q. Now, each one of those grooves is so cut as to give a separate Morse Code group signal, is it not?

A. Yes.

Q. And I have drawn on the board here just a little sketch.

(Discussion off the record.)

The Court: Is each groove limited to one signal?

The Witness: It is limited to two letters.

The Court: But one groove does not cover the humidity, temperature and pressure?

The Witness: If they should accidentally all fall on the same code group, they will.

The Court: But it is only one signal?

The Witness: There will be three separate signals, but repeating the same code group.

The Court: So it would be, as a matter of fact, MD, MD, MD?

[fol. 411] The Witness: Yes, sir.

Q. And there is one groove on that raised section of this phonograph record that will read MD, and will read only MD?

A. Yes, sir.

Q. And if you want to change that code group to XY, you have got to go to another groove?

A. Yes.

Q. And I have drawn on the board here a little schematic and grossly enlarged version of a cross-section of a series of grooves. Is that a fair representation, just to demonstrate what the groove would look like on a cross-section?

A. Yes.

Q. And fitting into those grooves would be a needle or stylus indicated by an arrow on the chart; is that right?

A. Yes.

(Discussion off the record.)

Q. And there is a known variance between the peak of one groove and the peak of the next groove, measured in millibars of pressure, isn't there?

A. I don't quite follow it on the peaks.

Q. Well, if the needle were to hit near the peak of a groove, it would not actually be the same millibar reading as if the needle had hit the groove at the very bottom of it, as I now indicate with a second arrow?

The Court: The first arrow is toward the top of the [fol. 412] hill, and the second is in the valley.

The Witness: I couldn't predict how—

The Court: You don't understand why it does that?

The Witness: He raised the question on the two points, and the probabilities are that the needle has enough swing to set itself in the groove.

The Court: I think you had better start the question over again, because I don't think you have got it.

Q. What you are saying is that if it gets into the groove it will slide down the hill and seat itself in the bottom?

A. Possibly, yes.

Q. More than possibly. It has to to read the code, doesn't it?

A. Yes.

Q. Because the code is in the bottom of the valley, isn't it, in a little dip like that (indicating)?

A. Yes.

Q. It is microscopic; you can't see it with the human eye, can you?

A. True.

Q. So no matter where the needle hits between the peak of one groove and the peak of the next groove, it will always ride down into the bottom, won't it?

A. Yes.

Q. And yet there will be a different reading for each location between the two peaks, won't there?

[fol. 413] The Court: I am surprised at that question. Maybe it wasn't what you are asking.

Mr. St. Clair: It is not a clear question.

Q. That is, the actual true pressure for a needle that enters the groove near the top of a peak, let us say on the right side, and the actual true pressure for a needle that enters the groove near the top of the peak on the left side, will be different, won't it?

The Court: If I understand the question, and maybe I don't understand it, but you and I at least start out with not knowing exactly what the questioner has in mind and we are trying to understand, the needle or stylus could land at a number of different points; it could land at the top of one hill, or it could land at the top of the next hill, or the bottom of the valley, or a lot of intermediate points. And the question put to you is whether there would be a different signal depending at which point it landed, whether on the slope, or one side of the slope, or the other side, or the bottom of the valley.

Mr. St. Clair: The signal would be the same, but the true pressure would be different.

The Court: Would it?

The Witness: It is possible.

The Court: Well, don't you know enough to know whether theoretically it is certain?

[fol. 414] The Witness: No, that is an engineering phase that I didn't get into.

The Court: You don't know about the scientific or engineering phase sufficient to testify about it?

The Witness: No, sir, not as far as the particular instrument is concerned, in that stage of it.

Q. And I take it that the operators under your jurisdiction or your assistants wouldn't know anything about that, either?

The Court: Well, they didn't learn it from him.

Q. As far as you know, they didn't learn it from anybody?

A. I couldn't swear for my subordinates.

Q. As far as you know, do you think the people that conducted these tests knew anything about what I admit is a rather complicated subject?

A. They may possibly know the principles.

Q. And you not know it?

The Court: I don't really think it means much whether they had some independent knowledge if they didn't disclose it to him.

Mr. St. Clair: I simply want to know if he can tell us whether it is possible that one of the operators might have known about it.

Mr. Caner: What was he talking about, your Honor?

The Court: I understand so far; I overrule the objection.

[fol. 415] The Witness: Did I know in relation to what?

Q. What we have been talking about on the board here, about the displacement of this stylus as representing in fact different true pressures.

A. I know some of it, the average knowledge that I gathered, but not from a scientific or engineering angle.

[fol. 416] Q. I am simply asking you this: whether or not you are satisfied that the operators who conducted these tests under your supervision knew at least no more about it than you do?

A. I didn't state that.

The Court: May I just be absolutely sure because I don't want you to be misled by the question. If I understood you correctly, you say you didn't know enough either from practical experience or theoretical knowledge to know yourself whether there was any difference in the pressure depending upon whether the stylus was on the top of one hill or at the bottom of the valley or getting to the top of the next hill? Did I understand you correctly?

The Witness: Yes.

The Court: Then you were asked whether you communicated your ignorance on this matter, or lack of knowledge, to those who worked with you. I think the general effect was that you had not communicated anything about this to those people who worked with you. And then you

were asked whether you had any reason to suppose any of those who worked with you or under you had knowledge on this subject which you lacked. Have you any reason to suppose any of them had any knowledge about this topic of pressure on the stylus depending upon its location on one hill or another or in the intermediate valley?

[fol. 417] The Witness: Yes.

The Court: You believe you have knowledge that they knew something?

The Witness: Yes.

Q. All right. Did you know that the difference from one groove to the next was approximately seven millibars?

A. In measurements or in actual practice?

Q. In true practice.

The Court: In what?

Q. In true pressure, the difference between this groove and that groove is approximately seven millibars of pressure?

A. All my measurements—

Q. Did you know that as a fact?

A. No, sir.

Q. Did you know there was any number of millibars represented by the difference between two adjoining grooves?

A. Yes.

Q. What do you say was the difference in millibars?

A. Approximately five millibars.

Q. All right. Five millibars. Let us take a radiosonde on the Government calibration test with the manometer there on a day under circumstances in which there is a known error. That happened, didn't it?

A. Yes.

Q. That error could be compensated for by simply read-

[fol. 418] ing a groove or series of grooves away from the designated one to compensate for the amount of the error?

A. I don't quite follow.

The Court: Neither do I.

Q. Let us assume there is an apparent error of 20 millibars known to anyone that is on the floor with knowledge

of these things on this particular day. As I understand it, you say you could call the young boy in college to come over and fix the manometer if he was around, right?

A. Yes.

Q. Or the radiosonde could simply be recorded as reading five grooves over or four grooves over?

A. I don't quite follow that line.

Q. You say each groove represents five millibars. There is an error under my supposed case of 20 millibars. So under those circumstances the operator simply could read four grooves over and produce the same result that the college boy with the wavy hair could?

A. The operator—

Q. Please listen to that question. If you do not understand it I will be glad to repeat it.

A. I can't quite follow the question.

The Court: Now supposing you had a bank account with a bank and you knew that you had $101 in there and by mistake the bank reported $105, the statement read $105. [fol. 419] One way of getting this thing right would be to go around and tell the bank that it ought to be $101, wouldn't it?

The Witness: Yes, sir.

The Court: Another way of doing it would be to make a deposit of, let us say, $10, and you subtract from the bank's report $4 and add $10, and you get the right figure of $111. Do you follow me?

The Witness: Yes.

The Court: In other words, you have a choice either to correct the bank or to take into account when you are making the calculation that there was an error of $4, and you yourself undertake an alternative way of getting to the right results. Do you follow me?

The Witness: Yes.

The Court: Well, now the suggestion is being made to you by Mr. St. Clair that instead of straightening out this instrument, this recording instrument, a perfectly possible way of doing it is, if you know the error amounts to 20 millibars, to use another short cut, to wit, to move the stylus over four valleys, each valley being the equivalent of 5 millibars. Do you follow me?

The Witness: That I follow, sir.

Q. That could be done by an operator without calling in the college boy, couldn't it?

[fol. 420] A. Yes.

Q. That would vary? It would be done on some days and not done on others?

A. Yes.

Q. That is, it could be done on days in which there was a known error on the manometer, is that right?

A. Yes.

Q. The manometer was checked at least once a day, wasn't it, with a standard barometer, as shown by the letter B on Exhibit 4?

A. Yes.

Q. So the amount of error was likely to be known?

A. Yes.

Q. Thank you. Do you really think your operators knew all about these things?

A. All about what, sir?

Q. These displacements of grooves and errors, manometers, and so forth?

A. My subordinates?

Q. The operators of these tests.

A. No.

The Court: I think he has a point. You used the word "your operators". He asked whether your question related to those operators who were his subordinates.

Q. Do you really think—

[fol. 421] Mr. St. Clair: I will withdraw the question.

Q. Do you really think that the people operating these tests, the Government calibration tests, really understood this displacement and the effect thereof?

A. Some may have.

Q. May have?

A. Yes.

Mr. Angoff: Your Honor—

The Court: Do you object?

Mr. Angoff: No. I think, while you were talking to

Mr. St. Clair, the witness had answered a question. I would like to have it read back. It is about two questions back.

The Court: All right.

(The following was read:

"Q. So the amount of error was likely to be known?

"A. Yes.

"Q. Thank you. Do you really think your operators knew all about these things?

"A. All about what, sir?

"Q. These displacements of grooves and errors, manometers, and so forth?

"A. My subordinates?

"Q. The operators of these tests.

"A. No.")

[fol. 422] Mr. Angoff: That is it.

Mr. St. Clair: Thank you, Mr. Angoff.

Mr. Angoff: I have to do something.

Mr. St. Clair: Your turn is coming shortly.

Mr. Angoff: There is nothing left for me.

Q. I guess we have already covered the shock test. Was there any test with respect to the parachute that was annexed to this instrument conducted under your supervision?

A. Yes.

Q. Is there any claim, if you know, that anything improper was done in connection with testing the parachutes?

The Court: Well, that is really not up to the witness.

Mr. St. Clair: I simply wanted to know if we should spend time on that.

The Court: You can ask that, but not publicly, whether the Government makes such a claim.

(Counsel confer.)

Mr. Caner: I think the indictment speaks for itself on that.

The Court: Well, I think that is the kind of question as to which really you ought to tell Mr. St. Clair, whether you are going to argue that or not argue that.

Mr. Caner: Certainly not.

The Court: All right. After all, this is not a game. [fol. 423] This is a charge of a set of false, allegedly false schemes.

Q. There is something mentioned in the indictment about somebody taking notes preparatory to getting rid of you, isn't there?

The Court: What was that? I didn't get it. I don't know anything about it, frankly.

Mr. St. Clair: There is something in the indictment about somebody taking notes preparatory to getting rid of Mr. Palliotto as the Government inspector.

The Court: Wait a minute. It is in the indictment? If so, where?

Mr. St. Clair: As one of the overt acts.

Mr. Caner: Yes, your Honor.

The Court: I wouldn't ask him whether it is in the indictment. He hasn't necessarily read the indictment any more than I have up to now read the indictment. He must not be asked about what the indictment recites. He may be asked about something recited in the indictment.

Mr. St. Clair: I will withdraw that.

Mr. Angoff: It is on the last page of the indictment, your Honor, paragraph 11.

Q. Did it come to your attention at some time that somebody at Standard Coil was trying to get rid of you?

Mr. Caner: If the Court please, may we approach the [fol. 424] bench?

The Court: This has to do with credibility and is admissible on that issue, no matter for what purpose the witness is called.

Mr. St. Clair: Correct.

The Court: Thank you.

Mr. St. Clair: I'm sorry, your Honor. I meant to say that I was offering it for that. That is what I was offering it for. I'm having a bad day.

Q. Did that fact come to your attention at some time, that alleged fact?

A. Would you mind repeating the question?

Mr. St. Clair: Would you read him the question.

(The question was read.)

A. Yes.

Q. That somebody was raising questions as to whether you were competent or not, is that right?

A. Yes.

Q. And you resented that, didn't you?

A. No, sir.

Q. You thought it was all right?

A. Perfectly all right, sir.

Q. Do you resent it today?

A. No, sir.

Q. You think it is perfectly all right for someone to [fol. 425] challenge your competency?

A. Yes, sir.

Q. To try to get rid of you?

A. Yes, sir.

Q. You think it is all right for a contractor of the United States Government to try to get rid of a Government inspector?

A. If he has causes, yes, sir.

Q. Did you think they had causes?

A. No, sir.

Q. So then you thought they were doing something they had no right to do?

A. No, sir.

Q. And you didn't resent it?

A. I didn't resent it.

Mr. St. Clair: No further questions.

The Court: Mr. Angoff?

Maybe we had better take a recess now. Are you going to be just ten minutes?

Mr. Angoff: No, no.

The Court: All right. We will recess until 2:00 o'clock.

(Noon recess.)

[fol. 426]

AFTERNOON SESSION

CONSTANZ PALLIOTTO, Resumed

Cross examination.

By Mr. Angoff:

The Court: You may now proceed, Mr. Angoff.

Q. Mr. Palliotto, you came to this plant, you testified, without any previous experience or knowledge concerning the radiosonde; is that correct?

A. Yes.

Q. When you got to Dighton you met three or four gentlemen working for the company previously at its California plant; is that correct?

A. Yes, sir.

Q. You were told that these gentlemen had been making these radiosondes previously; is that correct?

A. Yes, sir.

Q. You were told that the engineer, Mr. Graul, was in charge of engineering at the California plant; is that right?

A. I don't remember if that statement was made to me.

Q. Well, you knew he was at the California plant in an engineering capacity?

A. Yes.

Q. And he was coming along here to Dighton to start this plant in operation; is that right?

[fol. 427] A. No, I couldn't state that.

Q. You knew he was here for some purpose?

A. Yes.

Q. What purpose?

A. At the time I met Mr. Graul he was in Sales.

Q. You knew later on that he knew something about the manufacture of radiosondes; is that correct?

A. Yes.

Q. You were then introduced to Mr. Fong Foo, one of the defendants; is that right?

A. Yes.

Q. As a matter of fact, you got an office ten steps away from his, or was it ten feet?

A. About ten feet.
Q. Three steps away; right?
A. Yes.
Q. He was your neighbor?
A. Yes.
Q. And that office was located on this chart somewhere down this way, pointing to the bottom of the chart?

The Court: You are pointing to the record of a needle. You didn't mean that, did you?
Mr. Angoff: Not to the needle. I guess I am being needled.

Q. Your office was down at the bottom of that chart somewhere?
[fol. 428] A. Yes.

The Court: The chart is Exhibit 4.

Q. You were told Mr. Fong Foo had two degrees, was a graduate of UCL; is that correct?
A. Do you want to repeat that question?
Q. You were told Mr. Fong Foo was a graduate of UCL?

The Court: University of California, Los Angeles.

A. Not at that time, sir.
Q. You knew in a short time he held two degrees and was a graduate of UCL; is that right?
A. Yes, sir.
Q. You were told that the defendant Robert Knupp had served four years in the Air Force, working in the field of atmosphere, weather, spherics generally?
A. No, sir, I did not hear anything about him working in the Air Force.
Q. Did you know he was in the Air Force as a volunteer for years?
A. He was in the Air Force, that's all I know.

The Court: I realize the breadth to which you can examine a witness in connection with his credibility and I assume this relates to that. Does it relate to something in the direct testimony?

Mr. Angoff: Yes, sir.
The Court: All right.

Q. At any rate, all three of these people came to you and [fol. 429] said, "Let us tell you something about that gadget, that unit, the radiosonde," didn't they?
A. At one time, yes.
Q. And you says, "Go the other way; I know all about it," didn't you?
A. No, sir.
Q. You said, "I will go by the book," didn't you?
A. No, sir.

Mr. Caner: I object, your Honor.
The Court: There must be some basis for that question and I am going to assume Mr. Angoff, a reputable member of the bar, has direct testimony which will support the question. There is no better time to cross-examine the witness than when he is on the stand.
Mr. Angoff: Thank you, your Honor.

Q. At any rate, whatever you said, you refused to discuss their experiences and their wisdom and their know-how in the manufacture, inspection and delivery of the radiosondes; isn't that right?
A. I did not.
Q. Did you discuss it with them at all?
A. Yes.
Q. Did you ask for their help?
A. Yes.
Q. Did they offer it?
[fol. 430] A. Yes.
Q. Did you take it?
A. Yes. At times, yes.
Q. Up to what point in the first two or three weeks did you take their advice?
A. The first two or three weeks I did.
Q. After that you refused to; is that correct?
A. No, sir.
Q. For the most part after that you refused to?
A. No, sir.
Q. Well, let's see. One day the first employee was hired

other than those who came from California, three or four; is that right?

A. I didn't get that question.

Q. One day the first employee, the first worker came into the plant?

The Court: Obviously one day the first worker came into the plant. That doesn't help much. I don't know what you are talking about and I don't blame the witness for not knowing.

Q. There were certain persons named in the indictment called conspirators such as Mrs. Faria and others who went to work in the plant whom you met; is that right?

A. Yes.

Q. Not one of these people who were in production or inspection, so far as you knew, knew anything about radiosondes; is that correct?

[fol. 431] Mr. Caner: I object.

The Court: Overruled.

Q. Is that correct?

A. I didn't know what the personnel themselves knew about the radiosonde itself.

Q. Well, you know Mrs. Faria knew nothing about it?

A. That I can say so.

Q. You knew her husband George knew nothing about it?

A. That's right, that I can say so.

Q. You knew Mr. Ferreria knew nothing about it?

A. I couldn't say.

Q. Early in your experience in this plant in Dighton two or three inspectors came to assist you; is that right?

A. Yes, sir.

Q. You didn't know any one of them, did you?

A. I did.

Q. Which one did you know?

A. Which inspectors are you talking about?

Q. Which inspector did you know?

A. Mr. Manugian.

Q. Did you know any other person?

A. Mr. Zingarelli.

Q. Who else?

A. Mr. Blais and Mr. Lemay.

Q. Aside from Mr. Manugian you never mentioned the [fol. 432] o... names before. You weren't asked, perhaps.

A. I wasn't asked.

Q. You never mentioned their names before. None of the employees whose names I have mentioned, Mrs. Faria, her husband, Ferreria, knew the Morse Code; is that right? When you first got there?

A. I couldn't answer that.

The Court: I think you have an idea from observing people as to whether they have the Morse Code, and you know my knowledge isn't perfect. You know I don't know the difference between P and X, but you know I know it in general.

The Witness: Forty or fifty people in the area, I couldn't stand there and listen to everybody copy code.

The Court: That isn't the point. You knew if somebody has a general familiarity with the code if you watch them or see them handling an instrument in operation. I think you would be able to testify as to whether Mr. Caner knows the Morse Code.

The Witness: Yes, sir.

The Court: And whether I know it?

The Witness: Yes, sir.

The Court: Now you are being asked as to whether Mr. and Mrs. Faria knew it.

The Witness: I couldn't answer that, sir, because I was not that familiar with the two people at that time. I hon- [fol. 433] estly couldn't.

Q. You knew early in your experience neither one of those three knew the Morse Code?

A. No, I couldn't make that statement.

Q. As a result of your experience as a chief inspector, you knew later on whatever knowledge they had of the Morse Code was very limited, didn't you?

A. No, I couldn't make that statement.

The Court: Did you hear the Morse Code signals being given in their presence?

The Witness: Yes.

The Court: Couldn't you tell by the way they acted whether they had signs of recognition and familiarity?

The Witness: They had signs of recognition, yes, sir.

The Court: So from your observation of them you thought they knew the signals and their significance?

The Witness: Yes, sir.

The Court: Is that your testimony?

The Witness: Yes, sir.

The Court: Then you can answer the question, you see, if you will only pay attention to it.

Q. Did you know they had a limited knowledge of the Morse Code shortly after you met them, a week, two or three weeks?

A. Yes.

Q. Did they?

[fol. 434] A. Yes.

The Court: The testimony is they knew very little about it; is that your testimony?

The Witness: A limited knowledge, yes.

Q. Do you know who taught them?

A. No, I couldn't state for sure.

The Court: Not for sure, but do you know after reflection somebody was in their presence explaining it to them or showing them a chart or something of that sort?

The Witness: No, the various operators were all working here and there together, running code, copying code, reading code. I don't know who was teaching—

The Court: You mean you saw fellow employees teaching but you don't know which fellow employees taught whom; is that right?

The Witness: That's right, sir.

The Court: Just try to think how your answer sounds. If you had given it in the first place we would have, I think, drawn the inference you never saw them being given instructions, as you gave it in the first place. What you meant is you saw them being given instructions but you don't know who was giving instructions in their presence?

The Witness: That's right, sir.

The Court: Try to reflect on your answers. Remember these twelve people—they used to be called twelve good [fol. 435] men and true but now it is eleven good men and one good lady—are going to have to pass upon the innocence or guilt of these defendants called to the bar and they expect from you the truth, the whole truth and nothing but the truth, and the whole truth requires an attention on your part to the question and the answer so that you give that kind of complete answer which somebody needs in order to determine what is called a verdict, a statement of the truth.

Q. Did you see Robert Knupp, the defendant, teaching the Farias, either of them, or Ferreria or anyone else, the Morse Code?

A. I did not actually see Robert Knupp teaching them.

Q. What did you see, unactually or some other kind?

A. I saw Robert Knupp in the area where the personnel were studying and interpreting code.

Q. You heard him tell them to memorize various phases of the code, didn't you?

A. I do not recall that.

Q. Weren't you interested, as an inspector, as to whether or not these people knew the code, even to a limited extent? Weren't you interested?

A. Yes.

Q. They had to know the code in order to perform their operations for you; isn't that right?

A. Yes.

[fol. 436] Q. And it requires a certain amount of rote and memorizing, didn't it?

A. Yes.

Q. They had to be told to remember these things and to repeat them and know them automatically, spontaneously; is that right?

A. Yes.

Q. You heard him say, "Memorize this stuff," over and over and over again, didn't you?

A. I didn't remember hearing Robert Knupp saying that.

Q. You remember hearing Robert Knupp saying something to them about Morse Code, did you not?

A. At the present time I don't recall the exact words.

Q. But you heard him say something?

A. Yes.

Q. One day there arrived in your plant, according to you, inspectors who didn't know the Morse Code; is that right?

A. I didn't make that statement.

Q. Did Kowalski know the Morse Code when he came in?

A. The name is Kowlaik.

Q. I'm sorry, I was thinking of football. Did he know the Morse Code when he arrived, your inspector?

A. I can't recall at the present time whether he knew it or not.

Q. You do remember that he did not know the Morse Code; isn't that right?

[fol. 437] A. No, sir.

Q. Why do you hesitate? Don't you know whether an inspector knew the Morse Code or not? If he didn't know you would remember, wouldn't you?

A. I don't know whether I observed the man on that operation enough to see. Mr. Kowlaik was assigned to various other jobs besides the radiosonde. He spent very little time there.

Q. Can't you say definitely he did not know it when he came in?

A. No, sir.

Q. Do you know whether or not somebody had to teach it to him?

A. As far as to my knowledge nobody was trying to teach him.

Q. Did you ask any one of your inspectors, "Do you know the Morse Code?"

A. Yes.

Q. What did they say?

A. They knew it.

Q. Did you ask Kowlaik?

A. I don't recall at the present time.

Q. But you do recall you asked the others?

A. Yes.

Q. And the only one you don't recall is Kowlaik?

A. Yes.

[fol. 438] Q. There are various tests, which have not been referred to perhaps. First of all, you were in charge of every piece of material that came into the plant, is that correct?

A. No, sir.

Q. Weren't you in charge—

The Court: You mean in connection with radiosondes?

Mr. Angoff: Yes, sir.

The Court: Were you in charge—

Q. Were you in charge of every piece of material in connection with radiosondes that came into the plant?

A. The question is too broad, sir.

The Court: You can say No, you weren't, if you weren't. If you were, you answer Yes. It only requires a Yes or No. Were you in charge of all the materials for use in radiosondes?

The Witness: No, sir.

The Court: What material were you in charge of?

The Witness: The items used in the radiosonde, itself, such as capacitors and the resistors, the tubes, any components associated with the radiosonde equipment which the Government was purchasing.

The Court: Therefore, what were you not in charge of? What were you not in charge of in the way of equipment used for the radiosonde or material for the radiosondes?

The Witness: Various other material.

[fol. 439] The Court: Name some.

The Witness: The machinery that came into the place used—

The Court: That is not what you were asked. Machinery is not material. You certainly know the difference between the two.

Q. You were asked by the Court what you were not in charge of.

A. May I have the definition of the words "in charge of" as used by you?

The Court: Answer it as best you can. That is very simple. "In charge of" means having general supervision, not in the sense of custodial care, which requires you to lock up the material or count the items. "In charge of" is a common way of expressing supervisory authority.

The Witness: I couldn't say that I was supervising that material all the way through from the time it came in.

The Court: I didn't ask you that. What kind of material were you not supervising?

The Witness: Any material that had no relationship to the radiosonde unit itself.

The Court: All you have been asked about is that. You have given inconsistent answers again. Will you just listen to your own testimony read? Begin back where Mr. Angoff started putting questions about this.

[fol. 440] (The following was read by the reporter:

"Q. First of all, you were in charge of every piece of material that came into the plant, is that correct?

"A. No, sir.

"Q. Weren't you in charge—

"The Court: You mean in connection with radiosondes?

"Mr. Angoff: Yes, sir.

"The Court: Were you in charge—

"Q. Were you in charge of every piece of material in connection with radiosondes that came into the plant?

"A. The question is too broad, sir.

"The Court: You can say No, you weren't, if you weren't. If you were, you answer Yes. It only requires a Yes or No. Were you in charge of all the materials for use in radiosondes?

"The Witness: No, sir.

"The Court: What material were you in charge of?

"The Witness: The items used in the radiosonde, itself, such as capacitors and the resistors, the tubes, any com-

[fol. 441] ponents associated with the radiosonde equipment which the Government was purchasing.

"The Court: Therefore, what were you not in charge of? What were you not in charge of in the way of equip-

ment used for the radiosonde or material for the radiosondes?

"The Witness: Various other material.

"The Court: Name some.

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"A. May I have the definition of the words 'in charge of' as used by you?

"The Court: Answer it as best you can. That is very simple. 'In charge of' means having general supervision, not in the sense of custodial care, which requires you to lock up the material or count the items. 'In charge of' is a common way of expressing supervisory authority.

"The Witness: I couldn't say that I was supervising that material all the way through from the time it came in.

[fol. 442] "The Court: I didn't ask you that. What kind of material were you not supervising?

"The Witness: Any material that had no relationship to the radiosonde unit itself.

"The Court: All you have been asked about is that. You have given inconsistent answers again.")

The Court: I cannot understand you, sir, because I am sure you have been reminded as often as I ever reminded any witness of the solemnity of the task and the necessity of accuracy, and again and again you say things which do not jibe.

All right, Mr. Angoff.

Q. Do you want to make any comment or do you want to leave it that way?

A. No. The words "in charge of" still disturb me, and I can explain it if the Court will accept it.

The Court: I will allow you to speak, but I do not want you to suppose I accept in advance what you say. There are too many perils in that.

A. (Continuing) The material coming in was, some of it was inspected by me or my representatives. Then it was taken into the assembly line. If Standard Coil Products, Incorporated personnel wanted to destroy some of that equipment, that was their prerogative, or any of those components, if they wanted to destroy it, that was their [fol. 443] prerogative. I had no control over that. All through the operation of assembly, any units that they wanted to destroy, that was their prerogative. I was only responsible and able to control the units that had been accepted, and the final operational test, and the temperature, humidity and pressure tests.

The Court: If I understand it, and I am not at all sure I do, material reached the factory. The material may sometimes have been in the form of semi-fabricated or fabricated parts and may have been sometimes in the form of raw materials, such as wire. Am I correct?

The Witness: Yes, sir.

The Court: At the time that the material reached the factory and before anybody had processed it, that is to say anybody had handled it in the course of further manufacture, you were at that time in charge of all such material which was destined for radiosondes, is that correct?

The Witness: If I—

The Court: —at the time prior to processing.

The Witness: Yes.

The Court: During the stage of processing the corporation handled through its representatives and employees the semi-fabricated or fabricated parts and the raw material, is that correct?

The Witness: Yes.

[fol. 444] The Court: During that period of time you did not undertake to exercise physical control of this material nor to keep track of the items as they were going through the processing stage, is that correct?

The Witness: Right.

The Court: During that processing stage there may have been destruction due to faulty manufacture or due to deliberate acts or there may have been thefts or there may have been other conduct which resulted in the material being mislaid, is that correct?

The Witness: Yes.

The Court: As to all those what I shall call "accidents of manufacture" you had no responsibility, is that correct?

The Witness: Yes.

The Court: When the articles had been thoroughly assembled and manufactured and the processing had been completed and the article was submitted for a check by the Government inspector you then were once more entirely in charge of and supervising the radiosondes and material therein, is that correct?

The Witness: Yes, sir.

Q. All of the parts which went into the radiosondes were manufactured by companies, corporations or manufacturers other than the Standard Coil Products Company, is that correct?

[fol. 445] The Court: You mean the component parts, which I call the semi-fabricated parts?

Mr. Angoff: Yes.

Q. Is that correct?

A. To the best of my knowledge, yes.

Q. And the operation of Standard Coil was merely an assembly operation, is that right?

A. Yes.

Q. The component parts we referred to previously might have defects in them, is that right?

A. Yes.

Q. Quality-wise and inspection-wise you were in charge of that operation, were you not?

Mr. Caner: What operation?

The Court: I think that is a good objection.

Q. Quality-wise and inspection-wise you were in control of that material?

The Court: At what stage?

Q. From the time it came in.

The Court: Let us go step by step.

Q. The platter would come in through the front or the back door of the corporation. While you were present, you

or your inspectors, you were in control of that particular part from an inspection point of view. Is that right?

A. No, sir.

[fol. 446] Q. Who was?

A. Standard Coil Products, Incorporated personnel responsible for incoming inspection.

Q. Somewhere along the line you assumed control, did you not?

A. Yes.

Q. When the unit was all put together and you inspected units or samples of lots and you passed them, you or one of your inspectors certified that these units were inspected, did you not? I am referring you to a form which is called what?

A. DD 250.

Q. DD 250, which reads at the bottom—

The Court: Are you reading from an Exhibit C or some such exhibit?

Mr. Angoff: I don't think it has an exhibit number yet.

Mr. Caner: It has not been marked.

The Court: For identification now it will be marked with the next letter. Is it D? Exhibit D for Identification, will you describe it in the most general terms? What is it you are showing him?

Mr. Angoff: I am showing him a piece of white paper with various legends printed thereon.

The Court: It has DD- something on it?

The Witness: DD 250.

[fol. 447] Mr. Angoff: DD 250.

Q. At the bottom there is a date 12/24/57, is that correct?

A. Yes.

Q. With the typewritten copy of your signature, is that right?

A. Yes, with misspellings.

Q. Constanz is spelled incorrectly?

A. And Palliotto.

Q. And Palliotto is misspelled. I didn't do it.

Mr. Caner: If the Court please, I do not see that this is within the scope of the direct examination.

The Court: I am surprised you don't see it. I do.

Q. The following appears: "I certify that the items listed herein have been inspected by me or under my supervision, they conform to the contract and they have been accepted as note." Is that correct?

A. That statement as read is correct.

Q. This certificate which I have just read appears in connection with every lot, is that right?

A. No, sir. You will have to specify what you mean by "a lot" in relationship to this.

Q. With every unit you accepted, is that correct?

A. No, sir.

Q. When does it not appear?

A. As far as the plant was concerned, Standard Coil Products, Incorporated, this form was not used on the [fol. 448] radiosonde units.

Q. We will come to that later. Are you sure of that?

A. I'm sure because my signature does not appear on here and none of the Representative subordinates to me signed this form.

Q. Is that your signature?

A. That is not my signature.

Q. Isn't it the typewritten copy of your signature?

A. No, sir.

The Court: I thought it had already appeared that it did not correspond even to the letters of his name.

Mr. Angoff: I have another DD 250.

The Court: That will be marked Exhibit E for Identification.

(Two DD 250 forms, dated 12/24/57 and 11/22/57 marked Defendants' Exhibits D and E for Identification.)

Mr. Angoff: This one is dated November 22, 1957.

Mr. Caner: I renew my objection. I cannot see the relevance, your Honor.

The Court: Objection overruled.

Q. In connection with this last exhibit for identification, Defendants' Exhibit E for Identification, we have your original signature, don't we, right down below here?

A. Yes.

Q. You wrote it yourself?

[fol. 449] A. Yes.

Q. The spelling is correct?

A. Yes.

Q. And it says: "I certify that the items listed herein have been inspected by me or under my supervision, they conform to the contract"—?

A. —"except as noted."

A. Yes.

Q. Every single unit that went out had to have that sort of certification, is that correct?

A. No.

Q. Which ones did not? I am talking about radiosondes only.

A. The 25,000 on the first order and the 14,200 on the second order did not contain this certification.

Q. How many more were there left?

A. None.

Q. What were you certifying?

A. I am certifying here to six radiosonde equipment, United States Government property, which were in the plant, and they were inspected for quantity and identity only. They are Government property.

Q. All right. We will come to that. We will come back. Remind me. After the units were accepted by you were they [fol. 450] sent to a packaging company?

A. Yes.

Q. What was the name of the packaging company?

A. Perry Packaging Company, Boston, Massachusetts.

Q. When they went to the Perry Packaging Company in Boston they presumably were packaged by that company, is that right?

A. Yes.

Q. A bounce test was supposed to be made there, is that correct?

A. Yes.

Q. What is a bounce test?

A. A bounce test consists of essentially taking the case of packaged units, 6 units in this case, and dropping it off a table on eight corners.

Q. Eight corners?

A. Yes. The box has eight corners. You drop it once on each corner and then the units are tested to ascertain whether any damage has been done to the units from this test.

Q. These units had already been accepted, as far as you were concerned, is that right?

A. As far as the technical aspects of it, yes.

Q. Was the bounce test performed down at this packaging company?

Mr. Caner: If the Court please, I respectfully submit that the bounce test is not relevant, and is not one of the [fol. 451] indictment tests.

Mr. Angoff: I don't claim it is, your Honor. I want to show how many inspections there are. I will leave the subject.

The Court: I think now you have gone beyond the point where it relates to the direct examination, the functions performed at the factory, and I am now going to sustain the objection at this geographically remote point.

[fol. 452] Q. At any rate these units came back to the Standard Coil Company, did they not?

A. Which units?

Q. Some units came back?

A. Yes.

Q. And they came back under your control, didn't they?

A. Yes.

Q. There you inspected them again, did you not?

A. Yes.

Q. If there was anything wrong—

(Mr. Caner rises.)

The Court: I think the functions that he performed may be inquired into if for no other reason, and there may be many other reasons, because he was defective in his work and may want to pin the responsibility on somebody else.

Mr. Angoff: Exactly.

The Court: That may go to the issue of credibility. I don't see, by the government objecting, that it is doing anything other than underlining the point being made by the defense.

Q. At any rate you made another test completely under your supervision; is that right?

A. I would like to have the interpretation of just what you mean by "completely under my supervision."

Q. No Standard Coil employees had anything to do with the test?

[fol. 453] A. I disagree.

Q. If they did, you picked them?

A. No, sir.

Q. You were there during that test, were you not?

A. Yes, sir.

Q. During that test you were there all the time?

A. Not all the time.

Q. You or your inspectors were there all the time?

A. Yes.

Q. If there was anything wrong with that unit, then you sent it back for repairs to Standard Coil; is that right?

A. No. The unit is held on the side until disposition is made in conjunction with the quality control section of Standard Coil Products.

Q. Incidentally, I think a question came up as to what is an experienced witness and what isn't.

The Court: Experienced witness?

Mr. Angoff: Lawyer, witness.

Q. You are an experienced witness, aren't you?

A. I didn't understand so.

Q. You have testified in other cases, haven't you?

A. No, sir.

Q. Didn't you testify in a case at the Pentagon in Washington, D. C., before the Army Contract Appeals Panel?

A. Yes, before a board—one man.

[fol. 454] Q. On November 14, 1958?

The Court: Well, I am not going to say that the witness gave an answer which is false in any way because he probably understood the word "case" as referring to that kind of a controversy which is adjudicated by a judge or judge and jury, and you have referred to an administrative hearing conducted in the Pentagon.

Q. It wasn't the Pentagon, was it?

A. Yes.

The Court: Is there any other kind of hearing of any kind, legislative, executive, administrative or judicial or quasi-judicial in which you have ever testified?

The Witness: No, sir.

The Court: Not even in a traffic court?

The Witness: No, sir.

Q. Before we get down to the Pentagon you had this problem, did you not, at the plant: The government was shrieking, shouting, demanding—

The Court: Who is the government?

Mr. Angoff: I withdraw that. You're right.

Q. The persons who gave the contract to the company—

The Court: Who were they?

Mr. Angoff: The contracting officer—

The Court: Do you know the name of the contracting officer?

[fol. 455] The Witness: No, sir. I have seen so many of them come and go I can't recall.

Q. Was it Captain Lang? That name is familiar?

A. The name is familiar.

Q. I will look it up later. Whatever his name was, he was demanding delivery; isn't that correct?

Mr. Caner: I object, your Honor. There is no foundation established.

The Court: I assume Mr. Angoff knows something in particular about a complaint in respect to the witness. You are making it absolutely certain every time that the jury understands there is a ground of bias on the witness by your objection and every time I sustain the right of the defense to put the question, in order to show the bias of the witness.

Q. There was a complaint about delivery, wasn't there?

A. A complaint to who?

Q. You made the complaint, didn't you?

A. No, sir.

Q. Didn't you go down to Washington and testify out of 25,000 units, seven were not delivered and you demanded penalty?

A. No, sir. You are putting something in my hands which I have no authority to assume.

Q. You did testify, did you not? Did you not?

A. Yes.

Q. And out of 25,000 units, seven were not delivered; is [fol. 456] that correct?

A. Yes. I retract that. Seven units were not delivered until several months after the termination of the first contract.

Q. Out of 25,000 units?

A. Yes.

Q. The first contract was represented by a figure, I believe, of $2,365,000; right?

A. The dollar value I couldn't remember.

The Court: It is roughly right, is it? It was in the millions but not in the hundreds of millions?

The Witness: That's right, sir.

Q. Seven units valued at $650 were not delivered; is that correct?

A. I didn't say they were not delivered.

The Court: They were delivered later?

The Witness: They were delivered.

Q. Seven units valued at $750 were delivered late; is that right?

A. Yes.

Q. You said you talked, in that case, to Fong Foo about it, didn't you?

A. Yes.

Q. What did Fong Foo have to do with it?

A. My agreement with the—with Mr. Reniers and Mr. Don Graul was that any problems—

[fol. 457] The Court: Just a minute.

Mr. St. Clair: The statement of my agreement, in so far as it might pertain to an agreement with the company, I ask that this answer be stricken and as to any answer given, be not held binding on the company.

The Court: It is quite plain that the witness can be asked of various conversations with Fong Foo in order to show whether the witness has a bias with respect to Fong Fee.

Mr. St. Clair: That's right.

The Court: And for that purpose alone it is being allowed. It cannot be used substantively in order to pin guilt on anybody.

Mr. St. Clair: Thank you.

Q. What did Fong Foo have to do with the delay in delivery of seven units out of 25,000?

A. As it was—the information—we had agreed—

Q. Who is "we"?

A. Don Graul, Robert Reniers, Fong Foo and myself, that all matters relating to the radiosonde units and other matters would be relayed by me to Mr. Fong Foo, who would then relay it to the proper authorities in Standard Coil Products and is exactly the situation that existed. Mr. Fong Foo was informed of various subjects, various problems that we encountered, and so forth and so on.

Q. Mr. Fong Foo came back to you and told you in order [fol. 458] to get prompt delivery you had to get prompt and competent inspection; isn't that correct?

A. Not to my knowledge, no, sir.

Q. Did he say nothing?

A. Not as far as the capabilities of the inspectors.

The Court: Did he make any statement about prompt inspection, Mr. Palliotto?

The Witness: Yes.

The Court: Well, then, please tell us what he said about prompt inspection.

The Witness: He was concerned because we had various contracts running at the same time and they had a delivery clause in there which had to be met and we had so many operations going at once, various inspection points throughout the floor, it was a little difficult for me to assign inspectors and Mr. Fong Fee approached me on numerous occasions and asked me to assign an inspector to this operation or that operation which I could not do.

Q. And then you testified in favor of putting a penalty on the company of $20 a day with a total of $1,800 for failure to deliver the seven units on time; is that correct?

A. I testified for the government relative to the case.

The Court: Will you listen to the question? Did you, in effect, testify that it was your evidence that—that it was your opinion or your recommendation that a penalty of [fol. 459] $20 a day or a total penalty of $1,800 should be imposed on the company? Did you or didn't you?

The Witness: I did not make that recommendation.

Q. Did you make a report to the government in that case?

A. I made a number of reports to the—

The Court: The answer is yes, isn't it?

The Witness: Yes.

The Court: Let me just warn you that it is not only desirable to tell the truth, the whole truth and nothing but the truth, but to stay within the framework of the question. If you address yourself to the particular question you will help us and, incidentally, help yourself. Every time you step outside the frame of the question you run the risk of a rebuke from the Court and, what is also more serious, you aid counsel to find other grounds to ask questions.

The Witness: Yes, sir.

The Court: And unless you are as skillful as the lawyer, you are in a match in which you are going to come out very poorly.

The Witness: Yes, sir.

Q. Do you remember the question?

A. No, sir.

Q. I don't, either.

A. I believe I answered it.

Q. I think you answered it. Now, the company offered to [fol. 460] give the government six units; is that right?

A. I am not aware of that.

Q. You were against taking these units?

A. I was not because I didn't know the subject existed.

Q. Didn't you testify you saw one of these units in the company plant at about the time the plant closed?

A. Yes.

Q. Let's see. Those seven units were worth $650?

A. Something in that range.

Q. Did somebody offer, even before the case went to the

Pentagon, through you to give you the six units, seven units?

A. I don't recall.

Q. Is it unusual in 25-unit deliveries to have seven delayed? 25,000, I'm sorry; seven delayed?

A. Is it unusual, was the question?

Q. Yes.

A. Yes, it is unusual.

The Court: You mean it is unusually low?

The Witness: No, I would say it is unusual to be short.

Q. Seven units in 25,000?

A. Yes.

Q. You are angry at Fong Foo and you were angry at the company, weren't you?

A. No, sir.

[fol. 461] Q. Now, before we leave Fong Foo, a moment, you have testified yesterday, I believe, that Fong Foo submitted various submission sheets; is that correct?

A. Yes.

Q. On Page 176:

"Fong Foo told me that the material was ready for inspection and that they would like to have the inspection by myself and I in turn told Fong Foo that if the material was ready for the government inspection to submit that on a submittal sheet."

First he asked you to inspect it yourself, didn't he?

A. Yes.

Q. You turned it over in most cases to someone else, didn't you?

A. It all depended what the occasion was.

The Court: That isn't a response. Will you read the question, and answer, "I know" or "I don't know."

(The question is read.)

A. Yes.

Q. But Fong Foo asked you, in each case, that you yourself inspect these lots?

A. He did not say "you."

Q. Did you understand me when I asked the question the first time?

A. Yes.

[fol. 462] Q. Did I ask you the first time whether or not Fong Foo asked you to inspect these lots yourself?

A. Yes.

Q. What did you answer the first time?

A. I says Yes.

Q. You changed it now?

A. I don't quite follow the question on the word "you."

Q. We will go on to something else. Yesterday and the day before the Harvard Law School student and I examined—

The Court: I would rather you didn't testify.

Mr. Angoff: I'm sorry.

Q. We had examined—is this a fair statement—

The Court: "If an examination shows—"

Q. If an examination shows that among all those submission sheets none were submitted by Fong Foo, seven were submitted by persons whose names were signed and the remainder were signed by Sawyer, Jones, Bertel, Pembleton, and Ferreria, in that order of frequency, would that be a correct statement?

Mr. Caner: Well, if the Court please, I think that the question is if the submittal sheet shows that none of the sheets were submitted by Fong Foo, I submit that most of the sheets show whether or not Fong Foo signed the sheets.

The Court: I overrule it. Read the question.

(The question is read.)

A. I couldn't answer that Yes or No.

[fol. 463] Q. You tried to give us the impression yesterday, did you not, that Fong Foo made many submissions and signed them?

A. I did not say he signed them.

Q. Do you know of any one of them that he did sign?

A. Not unless I review each and every one.

The Court: You can take the time to do it tonight after the Court recesses. If you find any, will you please draw it to our attention?

The Witness: Yes, sir.

Q. Talking about those in the court room.

A. Yes, sir.

The Court: And please, the first thing in the morning, take the stand, even if you have finished testifying, so that you may answer whether you have discovered the signature of Fong Foo on any of the documents in the court room of the category described by Mr. Angoff.

The Witness: Yes, sir.

Q. Were any submitted by Mr. Knupp?

A. Not in writing, no, sir.

Q. Were any submitted in writing by Mr. Knupp?

A. No, sir.

Q. What are submission sheets for? Aren't you supposed to put them in writing?

A. I don't quite follow that question.

The Court: The question is, is the purpose of a sub- [fol. 464] mission sheet to show who made the submission as well as what was submitted?

The Witness: Yes, sir.

Q. Incidentally, you kept a log, diary log, from the time you first came to this plant; is that correct?

A. No, sir.

Q. You kept a diary, did you not?

A. I kept a log but not from the time I come into the plant.

Q. When did you start this log?

A. Sometime in February, 1957.

Q. In that log you put everything that happened in some abbreviated form, did you not?

A. Not everything that happened.

Q. All right. Do you have that log?

A. Not in my possession.

Q. Was that log destroyed?

A. No, sir.

Q. Who has the log?

A. The log is in the court book. I believe it is on the table.

Mr. Mitchell: I have it.

Q. In addition to the log you made many memoranda and suggestions, didn't you?

A. Yes.

Q. And to Fong Foo, always in writing; isn't that right?

A. The memos that I have are in writing but I also con- [fol. 465] veyed in conversation to him various recommendations and so forth.

The Court: The real question is, were there recommendations which were made orally which were supplementary to and different from the recommendations you made in writing.

The Witness: I don't quite—

The Court: Did you, in addition to such written communications as you made and such oral restatements of those written communications you made, also make quite different and additional oral statements to Mr. Fong Foo with respect to the subject matter of these contracts?

The Witness: Yes, I did.

[fol. 466] Q. Do you have all the memoranda you gave to Fong Foo available?

The Court: Do you mean copies?

Mr. Angoff: Copies, yes.

A. To the best of my knowledge, I have.

Q. Do you have all the answers Mr. Fong Foo gave you in the form of writing, in copy form?

A. I would have to check my files to see what he did answer and I would not be able to establish that he answered each and every one.

The Court: That was not the question. The question is: have you the answers or copies thereof?

The Witness: I have some.

Q. What did you do with the others?

A. I don't know what others.

Q. What do you mean that you have some?

A. I have some.

The Court: "Some" implies you haven't all. Have you all? Have you all of Mr. Fong Foo's answers? Yes or No.

The Witness: I have all to the best of my knowledge.

The Court: All right. Don't say "some." "Some" has a negative pregnant, an implication you have not all. "Some" is understood by people who use English correctly as implying "not all but many."

[fol. 467] The Witness: Yes, sir.

Q. Why did you keep a log and destroy your notes?

A. Which notes are you saying I destroyed?

Q. I think the first—

The Court: Yesterday you testified you destroyed some. Do you remember?

The Witness: Yes.

Q. Why did you destroy the notes and keep the log?

A. Because they had no relationship to the radiosonde contract.

Q. What did you think Mr. St. Clair was asking you about? What was he asking you about?

A. About notes.

Q. Notes about what?

A. I don't know. He didn't specify.

The Court: Well, quite seriously you don't believe, do you, he was asking, as Mr. Angoff said, about your love notes, do you?

The Witness: No. He was talking about the notes maintained in the plant.

The Court: Wasn't he asking about notes, or didn't you understand him to be asking about notes with reference to radiosondes?

The Witness: No, I think I interpreted his question to be a broad question relative to notes that I was keeping, I [fol. 468] may have kept.

The Court: What is your present testimony? Did you or did you not destroy notes which related to radiosondes?

The Witness: No, sir.

The Court: Never?

The Witness: Not to my knowledge, no, sir.

The Court: And we are to understand that your earlier answers meant you destroyed notes of a business nature but have no relation to radiosondes?

The Witness: That is correct, sir.

Q. Well, when you talked about destroying tapes were you talking about Minnesota Mining tapes?

The Court: Maybe they are Minnesota Mining tapes.

Q. Minnesota Mining tapes with relation to the Gorham Manufacturing Company?

A. I don't quite follow.

The Court: The Minnesota Mining Company is a company that manufactures tapes among other things, as you probably know.

The Witness: Yes.

The Court: You are being asked whether the particular tapes you destroyed were tapes which related to the Gorham Company?

The Witness: No, sir.

Q. They related only to the radiosondes manufactured [fol. 469] by the Standard Coil Products Company, weren't they?

A. Yes.

Q. You understood that clearly?

A. Yes, sir.

Q. When you were talking about submission sheets, you were talking only about submission sheets concerning radiosondes, is that correct?

A. No, sir. I was talking about some submittal sheets for the various lots of material that they had on the floor.

The Court: You think you have been asked about other things than radiosondes in this case?

The Witness: The questions, sir, have been broad, and I have not been able to define myself to the proper answer where it would refer directly to the radiosondes.

The Court: You said "define" or confine?

The Witness: I mean confine, sir.

Q. You saw the temperature test being made, did you not, an inspection supervised by your department?

A. I saw it, yes.

Q. They were being made at a table about as big as this little table here (indicating)?

A. Yes.

Q. I don't know what the length of this is or the width.

The Court: Arbitrarily shall we say five and a half feet by three and a half feet?

[fol. 470] The Witness: Yes, sir.

Q. And Mrs. Faria would be sitting about here, would she not (indicating)?

A. Yes.

Q. And if you were there, you would sit about here, two feet away from her, would you not, or on the same side two feet away?

A. Probably closer.

Q. Closer. You are in enough trouble. I have a good lawyer for you though. Now all temperature inspections were made under those circumstances?

A. I did not say that.

Q. If there was an inspector there, where the inspection was made, in front of the small table with the arbitrary figures, the operator and inspector would be sitting two or three feet apart, is that correct?

A. Yes.

Q. You say somebody was gypped under those circumstances?

A. I didn't state that the Government inspector sat there on each and every lot being inspected.

Q. At least he had the opportunity, didn't he?

A. If he was not busy on another operation.

Q. When he was not busy, when he was there—

The Court: I really think that you have now gone beyond the question of credibility. Now you are dealing with the [fol. 471] question of the second stage of the proposed examination of the witness.

Mr. Angoff: Yes. There is a borderline.

The Court: I think you have crossed the line.

Mr. Angoff: You will notice that I have been keeping away from the difficult operational stuff.

Q. Mr. Fong Foo made a complaint about you to Mr. Shapiro, did he not?

A. I'm not aware of it.

Q. He told you—

The Court: Is this the first time you ever heard of it?

The Witness: Yes, sir.

Q. Mr. Shapiro, to your knowledge, went over your head and complained about you as failing in your duties as an inspector, did he not?

A. I don't believe so. I never heard of it.

Q. Did Mr. Shapiro come to Dighton or North Dighton on October 1, 1957, or thereabouts?

A. Yes, sir.

Q. He called you, Mr. Fong Foo, Mr. Graul, and possibly Mr. Knupp together?

A. Yes, sir.

Q. And were any complaints made in front of you about your failures or alleged failures?

[fol. 472] The Court: Did anybody criticize you?

The Witness: Not for alleged failures, no, sir.

The Court: Did anybody criticize you?

The Witness: Not me personally, no, sir.

Q. What do you mean by "not me personally"? Do I get a little wavy—

The Court: Do you distinguish personally from officially?

The Witness: Yes, sir.

Q. Officially, personally, or otherwise, what was the complaint?

A. The complaint was that the standards were too tight, and they were having trouble meeting the standards, and they asked if they could have deviations.

Q. And they said that your equipment was no good, that some of your inspectors didn't know what they were doing? Is that what they said?

A. No.

The Court: What did they say? Did they say—

Q. What did they say?

A. If I recall, I have the minutes of the meeting that took place.

The Court: You may refresh your recollection.

The Witness: Yes, sir.

Q. What date was that?

[fol. 473] Mr. Mitchell: Can we have established who said what?

The Court: Well, I think you are certainly entitled to that when he begins to remember what was said. So far I am not clear what he remembers.

The Witness: I have it here now.

The Court: Well, now, without reading that aloud, you may read it to yourself. How long is it?

The Witness: It is not very long, sir.

The Court: Is it one paragraph or five?

The Witness: It is about nine paragraphs, sir, but it is short.

The Court: We will take a recess for five minutes. You can read it and refresh your recollection, and you can then be asked questions about it in more detail.

(Recess.)

[fol. 474] Q. Did you look over the October 3, 1957 sheet which you called a memoranda, I think?

A. It is a sheet of notes.

Q. That wasn't a memoranda to Fong Foo, was it?

A. I did not say it was to Fong Foo.

Q. It was an item you said should be discussed; is that it?

A. Yes.

Q. Wherever you had items or memoranda to submit to Fong Foo, this memo stated specifically, to Fong Foo from C. Palliotto; is that correct?

The Court: If I am not mistaken, the way the so-called memoranda or these notes came into the testimony is somewhat as follows: The question is whether the witness, Mr. Palliotto, had been the subject of criticism at a meeting and he was to look at anything he wanted to look at, including

the telephone book, which would help him recall criticism directed at him, officially, personally or otherwise in connection with his work or anything which might, as a result, create in him a biased, prejudiced witness, which would make him more or less unreliable. After you have refreshed your recollection during the recess and otherwise, do you recall now any conference in October or thereabouts in 1957 in which you or your work was subject to official or personal criticism?

The Witness: Not to my knowledge, sir.

[fol. 475] Q. In the hierachy of supervision over you, the next person over you was one Mr. Mozzi of Providence, Rhode Island, and Plantations neighborhood; is that correct?

The Court: What has the state got to do with it? Is it just a little exhibitionism by counsel?

Mr. Angoff: Yes. I'm sorry.

Q. Mozzi's office was in the Providence neighborhood, was it not?

A. No, sir.

Q. Where was it?

A. In Connecticut.

Q. And that part of Connecticut nearest Rhode Island; is that right?

A. I don't know what you call near. It was Meriden, Connecticut.

Q. At any rate when you and Fong had a peaceful disagreement or a disagreement of any kind Mozzi came in to settle the disagreement; is that correct?

A. Mozzi—as far as I know there was no disagreement that Mozzi was called in on.

Q. What was he called in on?

A. It was his normal visit to the plant and various subjects were discussed.

Q. And Fong Foo would tell him what he thought of your inspection system; is that correct?

[fol. 476] A. Yes.

Q. And Knupp would too, wouldn't he?

A. No, sir.

Q. By the way, you and Knupp stopped talking shortly after you got there, didn't you?

A. I disagree.

Q. You and Knupp were friendly?

A. To myself it appeared we were friendly. We ate together in the cafeteria the length of the two contracts and we sat side by side more than once.

Q. You hated each other, didn't you?

A. I didn't say that.

Q. You said you were going to get him?

A. Not to my knowledge did I say that.

Q. Did you tell Brown, your inspector, that?

A. No, sir.

Mr. Angoff: No further questions at this time. I reserve the right, of course, to ask—

The Court: Of course, on any other topic. Is there anything else on the redirect examination?

Mr. Caner: Yes, your Honor.

The Court: All right.

[fol. 477] Redirect examination.

By Mr. Caner:

Q. You testified in cross-examination concerning a change of grade from 11 to a 9, I believe. When did that change occur?

A. It occurred in December, the last week in December of 1958.

Q. And why?

Mr. St. Clair: Well—

The Court: I think that is fair enough.

Mr. St. Clair: I think it is fair enough but I would ask him to state in the course of it who did what.

The Court: That is fair enough. Did you get a written communication telling you why you were reclassified?

The Witness: No. There was correspondence between myself and the office. I was being transferred at the time.

Q. Did you get a paper from the office?

A. Yes.

Q. Will you produce that paper?
A. (Handing.)

Mr. Caner: This is a paper dated November 7, 1958—
The Court: It may be marked for identification as Exhibit 22. May I just look at it? Beginning "Memo from Mr. Constanz Palliotto; Subject, Reassignment."

(Memo dated November 7, 1958, from Mr. Palliotto, marked Government's Exhibit 22 for Identification.)

[fol. 477a] The Court (examining): This, if I may say so, has nothing to do, except his background, and there is a later communication. Is there a later one?
Mr. Caner: There are, your Honor.
The Court: All right, just a moment. As Exhibit 23 for Identification, a letter of November 17, 1958, from Mr. Palliotto to the Commanding Officer, United States Army Signal Supply Agency.

(Letter from Mr. Palliotto dated November 17, 1958 to Commanding Officer, U. S. Army Signal Supply Agency, marked Government's Exhibit 23 for Identification.)

The Court: And 24 for Identification is a letter of November 28, 1958, called Memo from Mr. Constanz Palliotto, Subject, Reassignment.

(Letter from Mr. Palliotto dated November 28, 1958, marked Government's Exhibit 24 for Identification.)

The Court: And then Exhibit 25 for Identification is a letter of December 5, 1958, Mr. Palliotto to Chief, QAOD, obviously Quartermaster, Army Overseas Division, or something like that.

(Letter from Mr. Palliotto dated December 5, 1958 to Chief, QAOD, marked Government's Exhibit 25 for Identification.)

[fol. 478] The Court: And then Exhibit 26 for Identification is a notification of personnel action on Standard Form 50-55 promulgated by the United States Civil Service Commission, FPMR1, relating to Constanz Palliotto.

(Notification of personnel action Form relating to Palliotto marked Government's Exhibit 26 for Identification.)

The Court: Now I think it will be the fairest thing if, instead of burdening the record and the Jury with a full consideration of these documents, that I say that I have read all of them and I am quite clear that their purport and general effect is that Mr. Palliotto had an opportunity to maintain his grade at Grade 11 but he was asked to take an assignment which was at a point inconvenient because of his wife's health. At his own request he sought a post which would not require him or his wife to move. He was told by the officials of the government if he insisted on that he might have to take a lower grade and lower pay. Knowing that that would be the consequence he still said he wanted to stay where he was and there was no job available in the area where he was in the Classification 11. There was available a job only in Classification 9, and it was on that account, and that only, that he was put in Classification 9. There is nothing to indicate his service in Classification 11 was in any way unsatisfactory. On the contrary he was offered an assignment at Classification 11 [fol. 479] in another area and it was merely because of his personal family problems that he chose a local job in a lower classification. Is that a fair summary?

Mr. Caner: Yes, your Honor.

Mr. St. Clair: May I make an inquiry as to where the proffered alternative was?

The Court: I will answer, but— The assignment was to General Electric Company, Clyde, New York, and the letter says that the wife was under doctor's care for several years and removal to Clyde, New York, would probably have serious effect on his wife's health and he himself was under doctor's care and transfer would aggravate the conditions of his. It is quite apparent from the file as a whole there was nothing at all derogatory with respect to his business or official actions which led to the reclassification. It was merely that there was no job opportunity locally at Grade 11. None of them are admitted. It will just clutter the record.

Q. What is your job at the present time, sir?

A. Quality Assurance Representative.

Q. And do you inspect certain materials?

A. Yes.

Q. What materials do you inspect?

A. Complete radar equipment. That is, the complete unit. Radar components at various manufacturers' plants such as the antenna, the receivers, transmitters, pressure [fol. 480] or aneroid—well, pressure operated equipment, wire, coaxial cable, fuses, receivers and transmitters for high frequency, slip ring assembly for fire control aboard Navy ships, radar components for aircraft and other items related to the radar or communication field.

[fol. 481] Q. Now passing to the calibration of the radiosondes for pressure, that operation, I take it, took place at Position 5 on the Chart, Exhibit 4, is that correct?

A. I didn't quite get the question.

Q. At what point did the calibration of the radiosondes for pressure take place?

A. The contractor's—

Q. The contractor's calibration of the unit.

A. At Position 5 and 4.

Q. You testified as to the points at which the calibration was made, 150, I believe, 350, and so forth, up?

A. Yes.

Q. Do you know of any occasion when the radiosondes were calibrated at any other points than those particular points which you specified?

A. Not that I know of.

Q. Take, for example, the 990. It was calibrated at that point, was it?

A. Yes.

Q. Did you ever observe it being calibrated at 991 millibars?

A. No.

The Court: What took you so long on your answer? I don't quite understand.

The Witness: I have to interpret which position it was [fol. 482] at. There are two positions where they check for the 990. They are side by side.

The Court: What are those two positions?

The Witness: Positions 4 and 5.

The Court: What does that mean? I do not understand.

The Witness: Well, in Position 4, they zero set it at 990 millibars.

The Court: At Position 4 on Chart 4, Exhibit 4?

The Witness: Yes.

The Court: At Position 5?

The Witness: In Position 5—

The Court: The same chart, same exhibit?

The Witness: Yes. They run—

The Court: Who is they?

The Witness: The contractor.

The Court: Who was the contractor?

The Witness: Standard Coil Products.

The Court: Who was the Standard Coil representative or agent who does this?

The Witness: I couldn't name her now.

The Court: Was it one of the group of inspectors that they had as their employees there?

The Witness: It was one of their employees. It was not an inspector.

[fol. 483] The Court: I see. All right. What did he or she set it at?

The Witness: He ran the unit through the 150 millibar range and up through the other levels I have testified to, up to 990.

The Court: The question that was being put to you was: was it ever on one side or the other of 990, meaning 991 or 989, or close to 990?

The Witness: It was close to 990 millibars.

The Court: Not exactly on 990?

The Witness: Quite a few were on 990.

The Court: Quite a few were not?

The Witness: No, I wouldn't say quite a few.

The Court: I don't understand an answer when you say "quite a few were" because to me "quite a few" has again a negative pregnant that some were not. Isn't that what it means to you in the English language?

The Witness: I'm not that well versed in the English language.

The Court: If quite a few times it was on 990, quite a few times it was not?

The Witness: Yes.

Q. Did you ever see it calibrated at a point other than 990?

Mr. St. Clair: Haven't we had the answer to that?

[fol. 484] The Court: We have.

Mr. St. Clair: I want it clarified, your Honor.

The Court: I can't blame you for trying to clarify it. We all must agree that clarification of this witness' testimony is always in order.

Q. Now this No. 4 point, pressure zero set, on Exhibit 4, that was done at 990 millibars?

A. Yes.

Q. Did you ever see it done at 991 millibars?

A. Yes.

Q. Did you ever see it done at 992 millibars?

A. No, that I couldn't say. Unless I was actually over the operator I couldn't tell exactly the point past the 990 or 991 point.

Q. Do you know at what point they customarily calibrated the unit?

A. Where the code letters changed from WA to WB, and it had to be adjusted at 990 millibars.

Q. Well, under what circumstances might it be adjusted at 991 millibars?

A. Sometimes to make the correction the operator would read it at 991 instead of 990.

Q. Then what would he do?

A. Then he would consider that unit acceptable to be processed through.

[fol. 485] Q. Well, now, a unit once so set at the 990 millibar point would return what signal?

A. 990 would be WB.

Q. You told us that it might be calibrated at 991?

A. Yes.

Q. Why would it return WB at 990?

A. The code groove was approximately 5 millibars wide and it could over a range of three or four millibars return the code group WB.

The Court: Are you saying WB, for Boston, or WV, for victory?

The Witness: WB, for Boston.

Q. Did you ever see any check made of calibration equipment?

A. Which calibration equipment? We had some standards in there which they used for calibration purposes, and were used and checked against the various pieces of equipment.

Q. Which pieces of equipment?

A. Well, the pressure zero set station.

Q. At No. 4?

A. Yes.

Q. What other pieces of equipment were checked?

A. The humidity chamber, the humidity zero set, the final operation station, the temperature test chamber, the temperature at zero set station.

[fol. 486] The Court: Excuse me. Have you completed? Didn't you tell us before the barometer was sometimes checked?

The Witness: The barometer, the manometer, yes.

The Court: Well, now please keep on telling us everything that was checked because we want to find out from you whether the equipment you used for so-called calibration varied itself and had to be shifted and changed and altered. If you measure something in connection with length, it is well settled that there is a standard meter and it is well settled there is a standard foot. Such standards, as you well know, are to be found in Paris, in Washington and elsewhere, and are used for purposes of "calibration." Calibration is using a standard gauge or measure for the purpose of checking the accuracy of some other measure. Here we want to know whether this standard, which was used, the equivalent of the standard meter or standard yard, was itself so unstable as to be checked.

As I understand it, you say it possessed qualities requiring checking. Is that right?

The Witness: Not the standard, sir.

The Court: Have you told us the chambers had to be checked?

The Witness: The chambers, yes.

The Court: Well, that was a standard used for calibra-

[fol. 487] tion?

The Witness: No. The standards are separate pieces of equipment which have been already certified as a standard.

The Court: Let us take the manometer. Will that do for an example?

The Witness: That is not a standard.

The Court: What is the standard?

The Witness: The standard would be the standard barometer marked B.

The Court: That is what I asked you about originally. Was the barometer checked?

The Witness: Yes.

The Court: All right. Unlike the standard yard or foot or meter as to which it is unnecessary to have a correction from time to time, the amount of variation in the standard meter or foot is so small, being built of such metal, having such location and such vacuum it does not vary much—you know that?

The Witness: Yes.

The Court: The barometer used as the basis from which calibration was made did vary, did it not?

The Witness: The standard barometer? Not to my knowledge.

The Court: Didn't you tell us it had to be adjusted from [fol. 488] time to time?

The Witness: Not the standard barometer.

The Court: The barometer didn't have to be when it was cold?

The Witness: No, sir. We were talking about the manometer to my knowledge.

The Court: Didn't the barometer from time to time have to be checked?

The Witness: Not against another instrument, sir.

The Court: Well, somehow or other it had to be checked, okayed or found to be in proper order, didn't it?

The Witness: At one time it was checked and certified as being a standard.

The Court: Wasn't it checked thereafter during the operation, during this two-year contract period?

The Witness: Not to my knowledge, sir. It wasn't checked against any other standard.

The Court: Well, it was checked in some way?

The Witness: Yes.

The Court: In what way?

The Witness: I think once during the year it was checked with the standard maintained by the Weather Bureau against the readings obtained by the Weather Bureau.

The Court: What you call "checking against another barometer." If you tried to find out whether it corresponds [fol. 489] with the one at the Weather Bureau, it seems to me you are checking it with the Weather Bureau, aren't you?

The Witness: Yes.

The Court: In other words, the basis used for calibration was itself from time to time used in another calibration process, to wit, the barometer at the Weather Bureau is calibrated with the barometer at Station 4, or whatever it is? Is it No. 4?

The Witness: No. It is B.

The Court: Station B, which is Barometer B, and which is calibrated with the various devices used in radiosondes, which are C-1, 2, 3, 4 and so forth?

The Witness: Yes.

The Court: So there is a calibration between A and B, the calibration between B C, B C-1, B C-2, et cetera?

The Witness: Right.

The Court: So B is itself subject to calibration process as well as entering into another calibration process, right?

The Witness: Yes.

Q. Was the standard barometer B used to check any of the other instruments used in connection with the tests and the production calibration?

A. Yes. It is used to check the manometer and the atmospheric pressure existing in the area at that time for the [fol. 490] use of the final operational station position 8. It is used to check the pressure at O set station, at Position 4, and also to check the pressure calibration station production at Position 5?

Q. That being where?

A. That would be the second line, the third chamber in from the left.

Q. How frequently were those devices that you have just referred to checked?

The Court: Which ones? I am sorry. I lost that myself.

Q. Namely, the Pressure Zero Set at 4, the Pressure Calibration Station at 5, the Manometer under the Pressure Control Box.

The Court: Aren't you putting too much in one question? They may not all have been checked during the same interval of time.

Q. Were they all checked at the same interval of time?
A. No. Some I could state when they were, some I couldn't.
Q. Tell us what you can about each particular item.
A. The manometer was checked every morning and at any other time when we may have raised a question relative to the accuracy of it.

The Court: Who is the "we"?
The Witness: I, myself, or the subordinate inspectors.

[fol. 491] Q. At what time of the morning?
A. It was generally calibrated before 8:00 a.m. in the morning.
Q. When you say calibrated, you mean checked against the standard barometer?
A. Yes.
Q. All right. What else was checked?
A. The final operation station, position A, contractor.

The Court: How often was that done?
The Witness: That was the position that actually did the checking of the manometers and a record was kept in a log at this position here.
The Court: Did you get my question?
The Witness: What is that?
The Court: How often—
The Witness: Several times. Once in the morning and several times during the day. The Positions 4 and 5, I could not establish how many times or at what time it was calibrated. That was under the control of Standard Coil's Production Department.

Q. Have you finished?
A. Yes.

Q. Now, Mr. Palliotto, let us suppose that on a given morning when the manometer was checked against the [fol. 492] standard barometer they were found not to correspond. What in that situation was done?

A. I would notify Mr. Allen Sawyer, if he was in the general area, or Mr. Faria, or Mr. Pemberton, and would ask him to get Mr. James Larson, who was the head of the repair section, head of the supervisors or over the technicians responsible for the equipment.

[fol. 493] Q. And did you observe what was done after you said these words to either one of these people?

A. Yes.

Q. What?

A. They generally obtained Mr. Larson for me.

Q. What would he do?

A. He would sometimes call Mr. Dingwall or Mr. Fellman.

Q. Who were they?

A. Technicians assigned to Mr. Larson, Jim Larson.

Q. Who were they employed by?

A. Standard Coil Products, Inc.

Q. What did you observe them do?

A. They would make the necessary adjustments so that the manometers would calibrate with the standard barometer.

Q. Passing to another subject, there was a time during cross-examination when a question arose about a unit which coded at minus 50 a group of signals for which there was no chart and you were asked what, in that circumstance, would be done and you stated, I believe that either a new chart would be made up or the unit would be rejected. Now will you tell us why, under those circumstances, the unit might be rejected?

A. Is that a unit rejected by the contractor?

Q. That's right.

A. In the normal course over a period of time the test results indicated that the units, radiosonde, would respond [fol. 494] within a certain range shown on the chart and if you had a stray unit that was far out on the chart in relationship to a reading, then that indicated there was something wrong with the elements comprising that par-

ticular section so therefore the Standard Coil Products, Inc. personnel would disassemble part of that unit and replace it.

Q. And what parts would be disassembled?

A. Sometimes it was the pressure elements, sometimes it was the temperature elements and sometimes it was the humidity elements.

Q. Of course if the unit was out only with respect the temperature element, then it would be only the temperature element that would be replaced; is that correct?

A. Yes.

Q. How long did that take?

A. Well, sometimes it was a 5-minute job and sometimes it may have been 20 minutes to a half an hour.

Q. Now, at the very beginning of the contract did you make reference to any provisions in the contract documents relating to sampling for calibration? For calibration tests, that is.

A. Yes.

Q. And what provisions did you refer to?

A. The specifications—the provisions in the specifications.

Q. By that do you mean MIL-R-11005B, otherwise known as Government's Exhibit 2-E and 3-C?

[fol. 495] A. Yes.

Q. What portion thereof?

A. On Page 12, Paragraph 4.3.1.

Mr. Caner: I read from that paragraph—

The Court: Will you be good enough also, as you read it, to mark it, with an ordinary pencil, with wavy line?

Mr. Caner (Reading):

> "4.3.1 Group A inspection. Group A inspection (including sampling) shall be in accordance with Tables IV and VI and Standard MIL-STD-105. Group A inspection shall be performed in any order which is satisfactory to the Government inspector except that the operational inspection (see 4.7) shall be last."

I will not read 4.7 unless the Court wishes me to.

The Court: I think you better. Anything that is incorporated by reference you have to read.

Mr. Caner: 4.7 contains four paragraphs. The heading is "Test conditions" and the subheading:

"4.7.1 Vibration. Except where a specific vibration test is listed, all of the tests on the radiosonde shall be conducted so that there shall be no vibration transmitted to the instrument under test. This re- [fol. 496] quirement applies particularly to the calibration and temperature test.

"4.7.2 Temperature. Unless other temperature conditions are specified, all tests on the radiosonde shall be made at room temperature. In temperature tests, the temperature of the air in the chamber within ½ inch of the bi-metal element shall be considered to be the test temperature.

"4.7.3 Pressure. In all pressure calibration tests the pressure in the chamber shall be increased without reversal of direction.

"4.7.4 Electrical. Unless otherwise specified, all tests requiring operation of the radiosonde shall be made using 3.0 volts direct potential for the power supply."

Q. Now, did you refer to any portion of MIL-STD-105?
A. Yes.
Q. What portion did you refer to?
A. I would have to look at the manual.
Q. In connection, now, with calibration tests.

Mr. St. Clair: Mr. Caner, is this 105A?
Mr. Caner: Yes, it is.

[fol. 497] A. Table III on Page 10 and Table IV-A on Page 11.
Q. What portion of Table III did you refer to?
A. The lot size of 181 to 300.

Mr. Caner: I read from that Table III. 181 to 300 are the words under the vertical column "Lot Size." Then we have another heading, "Inspection Levels." There are three vertical columns under that heading, I, II, and III. With respect to lot size 181 to 300 there are three letters

extending out horizontally under the three vertical columns, and they are F, H, and J.

With respect to lot size 111 to 180 there are, again, three letters and they are E, G, and I.

Q. You also stated that you referred to Table IV-A. What portion of that table did you refer to?

A. The sample size, code letter H on the first column.

Q. Why did you refer to the code letter H?

A. Because the code letter H was extracted from Table III.

Q. And where was that found?

A. On Table III the lot size of 181 to 300.

Q. And under what column?

A. The column marked II.

Q. Is there any correspondence between those numerals, I, II, and III, and the expressions "reduced," "normal" and "tightened inspection" or "testing"?

A. Yes.

[fol. 498] Q. What is the connection?

A. These, the numerals I, II, and III signify the inspection levels to be used for inspection purposes.

Q. Does Column 2 correspond to normal inspection?

A. Yes.

Q. And that letter with respect to Lot 11 to 180 is—

A. G.

Q. And with respect to 181 to 300 is H?

A. Right.

Q. Turning to the letter H on Table IV-A, you referred to that column, did you not?

A. Yes.

Mr. Caner: Reading the relevant portion of Table IV-A, there is a heading, "Sample size code letter" and then next to it another heading simply "Sample size." Parallel with the letter H is the sample size 35. Parallel to the letter G is the sample size 25.

Q. And yet you selected only five samples for each particular calibration test, did you not?

A. Yes.

Q. You didn't select 35?

A. No, sir.

Q. Or 25?

A. No, sir.

Q. Now, why not?

[fol. 499] A. During the early part of October when I was assigned to the plant I discussed the lot sizes with Fong Foo and at that time he informed me that if I wanted to take 35 samples it would be a hardship on the contractor, Standard Coil Products. It also would entail quite a bit of inspection, it would be rather costly, and that in California—

Q. Costly to whom?

A. Costly to Standard Coil Products, Inc., and that in California they had been on the basis of five samples per lot for temperature, pressure and relative humidity.

Q. Did he, in substance—

Mr. Angoff: Just a moment. I ask it be stricken, your Honor. It is not relevant.

The Court: All I can say, it is opening up a new cross-examination.

Mr. Angoff: Exactly.

The Court: I am going to allow it. It is relevant to the case. It is entirely up to Mr. Caner whether he is going to keep within the limits.

Q. Following that conversation with Fong Foo did you do anything?

A. Yes.

Q. What did you do?

A. I phoned my office in the U. S. Army Signal Supply Agency in Philadelphia and I talked to a person in the [fol. 500] Quality and Analysis Branch, the name I don't remember, and put the substance of the conversation I had with Fong up to him relative to how many samples I could select and how many defects would be allowed, and at that time he informed me we could operate on a basis of five samples for the temperature, five samples for the pressure, and five samples for the relative humidity.

Q. Now, I believe that during cross-examination a reference was made to a Form DD745, sampling by attributes; is that correct?

A. Yes.

Q. To whom did you send copies of that form?

A. Two copies were sent to the Chief of the Quality Assurance Operation Division, U. S. Army Signal Supply Agency, Philadelphia, in care of the Quality and Analysis Branch.

Q. Who is that Chief?

A. The Chief of the Quality Assurance Operation Division was Arthur Haak.

Q. It wasn't Shapiro then?

A. No, sir.

Q. What was Shapiro's title?

A. Leo Shapiro was Chief of the Eastern Regional Branch.

Q. This is the form on sampling, is it not?

A. Yes.

Q. And a copy was sent to Fong Foo, was it not?

[fol. 501] A. Yes, a copy was given to Fong Foo by me personally and the substance of the form, the entries and the statement on the form we discussed with him at that time.

Q. Now will you tell us how many different materials, and what they were, that you inspected in the Standard Coil plant?

A. The radiosonde, the oil pressure gauges, water pressure gauges, camera control units, 1½ inch motors, various types of Servo motors, drawings for the Signal Corps and Air Force, reviewed technical data being supplied with the item of equipment purchased for the government. There may have been several other items which I don't recall right now.

[fol. 502] Q. Was there any customary number of inspector or inspectors assigned to radiosondes?

A. Yes.

Q. How many?

A. One.

Q. Was there any customary number of inspectors in the whole plant?

A. Yes.

Q. What was that customary number?

A. Two besides myself.

Q. And with respect to the radiosonde operation, at how many different points were the radiosondes tested?

A. Nine positions.

Q. Now were they tested individually or simultaneously?

A. The lots?

Q. Yes.

A. Yes.

Mr. Angoff: I'm sorry—

The Court: Simultaneously or individually?

Mr. Angoff: He said Yes. I don't know what he means.

Mr. Caner: All right. It is withdrawn.

Q. Will you tell us whether the tests on radiosondes were run one at a time or all at once?

A. No, some of the tests were run at the same time.

Q. What tests were run at the same time?

[fol. 503] A. The temperature calibration, the pressure calibration, at times the humidity calibration, at the same time as the other two tests, and Position 14, the final operation station. These were at times running all together, and then also we had a shock test at Position 15, and possibly several lots ready for us at packaging and packing.

Q. Was it customary then that the temperature, pressure and humidity tests and the final operational test would be all going simultaneously?

A. I would say that approximately 50 per cent of the time those operations would be going simultaneously.

Q. There were questions concerning whether or not the single head recorder at the Temperature Control Station was in plain view. How close did you have to stand to the single head recorder in order to see what it indicated?

A. You would have to stand right over it, approximately a foot or a foot and a half away.

The Court: You mean it is like reading any book?

The Witness: Yes.

Q. There was also testimony concerning whether you could see Viola Faria, or whoever was sitting at the Temperature Control Station—

The Court: —when you were sitting beside her,—

Q. —when you were sitting beside her.

[fol. 504] The Court: That is the question—when you were sitting two feet beside her.

Q. You could see her then?

The Court: That was one of the questions.

Mr. Caner: All right.

Q. Could you see her from over in Position 13 where the Humidity Chamber was?

A. I could see her person.

Q. Could you see what she was doing?

The Court: It depends on what she was doing.

A. No, sir.

The Court: Obviously he could see her if she were waving. Isn't that right?

The Witness: Yes, sir.

The Court: You couldn't see her perhaps if she had her hands by her side and was cleaning her fingers?

The Witness: No. In fact, sometimes I couldn't even see her if a rack of material was in the way, sir.

The Court: All right.

Q. Could you see her from the final operational station 14?

A. No.

Q. With respect to the manometer, how close did you have to stand to see what was indicated in the manometer?

A. It was rather difficult—

The Court: No.

[fol. 505] A. (Continuing) The only way—

The Court: No. How far?

A. (Continuing) You would have to have your head and eyes away from the manometer about 6 to 10 inches.

The Court: In other words, like reading a barometer or thermometer or anything else comparable, you have to be sufficiently close to read the figures and see the lines, is that it?

The Witness: Yes, sir.

Q. Was there not a hole you had to look through?

A. No. You had to look through a magnifying glass, and you had to read a column of mercury in relationship to two parallel lines that existed on either side of the gauge.

The Court: As bad as footnotes in an opinion.

Q. In the period between October of 1956 and October of 1957 was any inspector stationed at any particular point in the inspection process?

The Court: What do you mean by stationed? Was he positioned without moving?

Mr. Caner: The word "stationed" was used in cross-examination.

The Court: Yes. But you are now putting it in a rather different sense. The Oxford Dictionary may have 20 pages of different meanings. What do you mean by "stationed" in your question? Do you mean was that his base of [fol. 506] operation?

Q. Did you assign any inspector during this period October, 1956 to October, 1957 to stand at any particular point?

The Court: To stand in the sense of a sentry?

Mr. Caner: Yes, your Honor.

The Court: That is obviously a different meaning than was given on cross-examination.

Mr. Caner: I don't know what meaning was intended on cross-examination.

The Court: Maybe you have difficulty in understanding as the witness has difficulty in understanding English in its context. I would have thought it was perfectly plain that station, as used in the cross-examination, means given a place, such as I am given a place. My station here is behind the bench. I am not stationed as a sentry. I walked up and down like a sentry in the last few minutes but that was out of impatience, not out of duty.

Q. Did you assign, during this period, any subordinate inspector to any particular place?

A. No, sir.

Q. After October, 1957 did you assign a subordinate to any particular place?

A. Yes.

Q. What place?

[fol. 507] A. At Position 11 called Temperature Test Chamber, Signal Corps and Production, and in conjunction with that position, where it shows the Temperature Control Station used for Government testing, in the second box from the left, the second box from the top.

Q. Where is Position 11?

A. That Position 11 is the Temperature Chamber associated with that control station.

Q. Did you assign anyone to any position with respect to the shock test?

A. Yes.

Q. What place did you assign him?

A. During the course of running the Shock, Position 15.

Q. That was after October, 1957?

A. Yes.

The Court: Would you tell me whether this came into the cross-examination? I haven't this clearly in mind as being in the cross-examination.

Mr. Caner: It was in the cross-examination, your Honor.

The Court: Position 15?

Mr. Caner: There were numerous questions as to whether an inspector was stationed at various places on the radiosonde department floor.

The Court: It had to do with 4 and 5. I don't think [fol. 508] it had to do with 15. I thought it was perhaps in relation to the direct examination. You are not permitted to cover the same ground on redirect examination unless it has some bearing on cross-examination.

Mr. Caner: It had appeared to me, your Honor, that an impression had been left that there were people stationed almost as a sentinel behind every test operator at the test positions. That is why I wanted to clear it up.

Q. Now with respect to the notes that you said that you destroyed would you tell us just exactly what the notes were that you destroyed?

A. The notes that I destroyed with the exception of the tapes were completed folders on subcontracts which, under the regulations and the procedures that we operate on, after three months we can—

The Court: Please don't tell us why. You are being asked, first, what you destroyed. If I understood your answers on cross examination to the Court and defense counsel, you said all that you destroyed besides the tapes related to matters other than radiosondes.

The Witness: Yes.

The Court: Is that still your testimony?

The Witness: Yes.

The Court: In view of that I don't see any reason to [fol. 509] inquire further.

Q. With respect to the tapes you destroyed, did you have any customary practice with respect to the destruction of tapes?

A. Yes.

Q. What was that?

A. After a lot had been subjected to the various tests and the data had been placed or had been compiled from the tapes to the work sheets, and after we had reviewed the results, and the lots had been accepted, the tapes were generally in our office for a period of up to a month, and after a month or unless the contractor had any question on any lot, or we did, or I, myself, had any question on any lot, those tapes that were not under question were destroyed.

The Court: I am not clear about that answer. Of course we have all seen there are tapes which survived until the present day. Am I to understand your answer means that whenever a tape showed a defect the tape was kept.

The Witness: Yes, for a period of time.

The Court: Evidently for an indefinite period of time because some of these are now four years old, or approximately so.

The Witness: Well, the tapes would have been four [fol. 510] years old if we had kept them.

The Court: What we are trying to find out—I am just

trying to make sure that you give us testimony which is an accurate statement. There is some tape which has survived for four years, that tape which shows there were alleged defects in the instruments. Is that right?

The Witness: I don't know if these tapes do show—

The Court: Can you explain why they survived for four years? You told us the ones that survived were the ones which showed defects.

The Witness: On these tapes?

The Court: The accuracy of your testimony is to be in a way tested by what we see, what Professor Wigmore called "autoptic proference." The thing speaks for itself. We see in front of us tapes which you have told us are four years old, don't we?

The Witness: Yes.

The Court: We want to know what principle of selection accounts for the survival of this tape.

The Witness: Some of this tape may have been mixed up or in with the folders that are now here and we didn't—

The Court: Don't use "we".

The Witness: I didn't in the packaging of these records for the Government remove anything that was in the [fol. 511] boxes. Those two boxes of records were taken out of Standard Coil Products, Incorporated at North Dighton, and the tapes may have been in there, and I believe I ran across another couple of tapes this morning I attached to a sheet.

The Court: Well, now what we want you to tell us is: is it mere chance that a tape survives? Were all tapes supposed to have been destroyed and this by accident survived, or was there a principle of survival?

The Witness: It was by accident they survived.

The Court: In other words, of course it is perfectly possible, for example, to take an extreme case, that a sheet of the daily newspaper of 1956 is hanging around in my office because by accident I forgot to put it in the waste basket and throw it away. It is my regular practice to throw away the daily newspaper on the day I have read it.

Now the fact one survived would not be contrary to the principle. It would merely show I was not very careful.

or my secretary was not very careful, in carrying out the principle.

The Witness: That is right.

The Court: The principle is clear enough, isn't it?

The Witness: Yes.

[fol. 512] The Court: Are you telling us that the principle was to destroy all tapes but that in carrying it out by mere mischance a few tapes survived, just like my daily newspaper?

The Witness: Yes.

The Court: Just as accidental as that?

The Witness: Yes, sir.

The Court: There were only, well, let us say, 25 tapes that survived out of the several thousand used?

The Witness: I don't know the quantity. It is possible that 25--

The Court: More than 25?

The Witness: No. Unless I count them—there might be possibly 25 tapes.

The Court: There is no principle; they just survived?

The Witness: No principle.

The Court: They were like the few people in Hiroshima who survived the atomic blast?

The Witness: As far as I know. It was by accident.

The Court: Absolute accident?

The Witness: Yes.

The Court: No design?

The Witness: No design, sir.

The Court: You didn't intend to have them saved.

[fol. 513] The Witness: No, sir.

The Court: You can't explain how they survived?

The Witness: As I say, they may have been mixed up with some of the lots and the test records I have there, sir.

The Court: You don't think they had any purpose at all? Just like the sporting page sheet of the October 1, 1956 newspaper--just by accident?

The Witness: Just by accident, sir.

[fol. 514] The Court: And you don't think that had any purpose at all? Just like the sport page sheet for October 1, 1956? Just by accident?

The Witness: Just by accident, sir. They were not intended to be used. In fact they were supposed to have been destroyed. I had assumed that. Evidently when I removed the two boxes with the records, the tapes must have been in those boxes. I can't sit here and say I purposely saved those tapes because that would not be true, sir.

The Court: And you don't know why they survived; it is just happenstance?

The Witness: It is by accident, sir.

Q. Did you have a practice of now and then attaching tapes to the test data sheets?

A. Yes, I believe—

(Mr. Angoff rises.)

The Court: You mean just because I might cut out the stock market page on the 31st of December every year for the purpose of finding out the closing stock market average for that year. In general I destroy the paper but on that date I save that page. But that is a subprinciple and not the main principle. Is that the way those tapes got survived, because in general you destroyed but sometimes for special purposes you saved?

The Witness: As far as I am concerned I have no reason to save any tapes for any special purpose. If there [fol. 515] is a tape in those records it is by accident.

The Court: But you didn't save any?

The Witness: I personally did not save any tape.

Q. Did you have any discussion with any personnel of Standard Coil in regard to giving instructions to the operators of these calibration tests?

A. Yes.

Q. With whom?

A. Mr. Fong Foo and Mr. Allen Sawyer.

Q. And when did you have the first discussion?

A. It would be early in October, 1956.

Q. And what was said in that discussion?

Mr. Angoff: With Fong Foo or with Sawyer?

The Court: With Fong Foo, I understood.

Q. Who was present at the discussion?

A. Fong Foo and Mr. Sawyer at various discussions.

Q. All right. Now, at the first discussion who was present?

A. Fong Foo on the first one.

Q. What was the discussion that you had?

A. Relative to the personnel that would be assigned to the government inspection of the calibration of the units.

Q. What was said in the discussion?

A. I told Fong Foo I wanted to see the Quality Control Department to run—assign their personnel to run these tests for me and if I was not there, to make sure that the [fol. 516] tests being run were being run directly under the supervision of the Standard Coil Products Quality Control Section.

Q. What did he say to you?

A. Mr. Fong Foo says that he would take whatever action was required to comply with as much of any request as possible. That was, namely, to assign Quality Control personnel to the operations and that the operations on a government testing would be under the direct supervision of his department.

Mr. Angoff: Your Honor, I ask that the entire testimony be stricken because it doesn't answer the threshold question which was, what discussions did you have with Fong Foo as to giving instructions to certain employees. The answer does not relate in any way to the giving of instructions to certain employees.

The Court: I think the objection is well taken. The answer is struck. The question is to be answered.

Mr. St. Clair: Your Honor, as far as it concerns me I am not moving it to be struck and would consider it part of the record in this case.

The Court: Regardless of whether you like it or Mr. Caner likes it, it is not responsive to the question and is struck. You may later want to put another question and get the same information.

Q. Did you have any discussion—

The Court: Let him answer the question. He hasn't [fol. 517] answered yet.

Mr. Caner: Will you read the question, please?

(The question is read, from Line 4 to Line 6, Page 515.)

The Court: Yes or No.
The Witness: Yes.

Q. What conversation did you have?

The Court: About instructions.

A. In October, 1956 I told Fong that I wanted to see Quality Control personnel operating the stations used for the government testing and if there was any—

The Court: Now I am going to stop you. That is what got you into all the difficulty last time.
The Witness: No, I am going to explain that, sir.
The Court: I don't care to hear you explain it.
The Witness: I am coming right to the answer—
The Court: Excuse me, you have to follow the directions of the Court: Will you please answer the Court? What conversation did you have with respect to instructions?
The Witness: At this time in October I told Fong Foo that any instructions that I would have to convey to a particular person running an operation would be done through either himself or through a personnel of the Standard Coil Products Quality Control Department.

Q. And did you have a conversation with him as to what [fol. 518] persons should conduct the tests?
A. Yes.
Q. What was that?
A. I discussed in October with Fong Foo and recommended and desired that the operations be run by Quality Control personnel from his department.

The Court: Excuse me; are you almost through, Mr. Caner?
Mr. Caner: I have—I think it will take me about fifteen minutes to finish with this witness.
The Court: Well, I don't think I will hold the jury for that period of time, particularly since this witness has to be here, in any event, hereafter. What is the first thing you are going to testify to in the next session of the court?
The Witness: I don't know, sir.

The Court: You don't? Do you remember an instruction which I gave you of something you were going to do?

The Witness: Oh. Relative to the records on Fong Foo's signature.

The Court: Yes. That is the first question which will be put to you on Friday morning at 10 o'clock when this case begins again. You don't have to examine them tonight because you will have all tomorrow, if you want to do it tomorrow.

There is one very minor matter to call to the attention [fol. 519] of the court reporter. I haven't read, by any means, all of the transcript, but both at Page 327, Line 9, and in other places I used the word "collaboration." It is typed "corroboration" and should be corrected in the various colloquies so that the transcript reads correctly on that point. My correction at this point is not to be construed as an admission I have read the whole record and that there are no other errors.

Is there something you want to draw to my attention?

Mr. St. Clair: No, if your Honor please.

The Court: The Judiciai Conference of the First Circuit, as you know, takes place tomorrow and that means that the Judges of this Circuit and the Justice of the Supreme Court of the United States assigned to this Circuit will meet during the day and this case will not be heard until Friday at 10 a.m. You may adjourn the court until Friday.

(Adjournment.)

[fol. 520]

SIXTH DAY

Court Room No. 6
Federal Building, Boston
September 16, 1960

The Court: Gentlemen, the wife of the Foreman has told the Court that the Foreman has a virus connected with a condition of hepatitis. I shall do whatever you wish, either recess the case today and call you back on Monday

or proceed with a jury of eleven, if you waive the twelfth juror, in which event, of course, I would appoint a new Foreman. I shall ask the defendants first to express a view.

Mr. St. Clair: If your Honor please, on behalf—may I have just a moment?

The Court: Yes.

Mr. Angoff: Your Honor, before we have a moment there are a couple of places in the transcript I think were incorrect. Next Monday or so?

The Court: That you may straighten out by talking with the court reporters and if there is any difficulty I will endeavor to arbitrate.

(A brief pause.)

Mr. Angoff: Your Honor, I know what I am going to do. I would want to wait at least until Monday. I don't know how serious hepatitis is.

[fol. 521] The Court: I want to tell you the only prominent person who ever had it is no longer in the Senate of the United States.

Mr. Angoff: In 1944 I had it.

The Court: I am glad to know there are people who recovered from it. I can't compel you to go ahead with a jury of less than twelve. That by itself settles it.

Mr. Angoff: It is such a complicated—

The Court: Never mind the reason.

(Discussion off the record.)

The Court: This case will now adjourn until Monday.

(The Jury retires.)

Mr. St. Clair: May I see your Honor at the bench?

(Conference at the bench.)

(Adjournment.)

[fol. 522]

SEVENTH DAY

Court Room No. 6
Federal Building, Boston
September 19, 1960

The Court: Good morning. I am glad to see you back, Mr. Foreman. We are all very interested in you.

(The Court proceeds to other business.)

The Court: All right. The case on trial.
Mr. Caner: Mr. Palliotto.

CONSTANZ PALLIOTTO, Resumed

Redirect examination.

By Mr. Caner, Continued:

Q. Mr. Palliotto, since we suspended on Wednesday have you reviewed the submittal sheets?
A. Yes.
Q. Are any of them signed by Fong Foo?
A. No, sir.
Q. Who are they signed by?
A. Allen Sawyer, Al Jones, Jim Pemberton, George Faria, and Walter Moraz.

The Court: Have you mentioned him before?
The Witness: No, sir.
The Court: Who is he?
The Witness: He was an inspector on the motor lines.
[fol. 523] The Court: Who was his employer?
The Witness: Standard Coil Products, Inc.

Q. Did you mention a Mr. Bartel?
A. Yes, John Bartel also signed a variety of them.

The Court: I beg your pardon? Was he an employee of Standard Coil?
The Witness: Yes.

The Court: What was he?

The Witness: An employee of Standard Coil in the Quality Control Department.

The Court: Some of those words you mouthed. Read it back, please.

(The answer is read.)

The Court: Is that all you said?

The Witness: That's all I said.

Q. In cross-examination by Mr. Angoff you testified Fong Foo would ask you to inspect lots for calibration. Did he ever ask you to personally test the lots for calibration?

A. No, sir.

Q. You testified on cross, did you not, that you would throw out the test tapes about every two or three weeks?

A. Yes, sir.

Q. Now, did you keep any record of what the tapes showed?

A. Yes.

Q. What record did you keep?

[fol. 524] A. On each lot we have work sheets where the data on the work sheet has been taken directly off the tape.

Q. And where are they?

A. Those are here in the court room.

The Court: What do you call those?

The Witness: Work sheets.

The Court: Have they got some other name beyond that?

The Witness: Not to my knowledge, sir.

Q. Now, with respect to temperature was there not a sheet entitled Temperature Performance Test Data Sheet?

A. Yes.

Q. Is that one of the sheets of which you spoke?

A. Yes.

Q. And that contained on it a record of the signals shown by the tape, did it not?

A. Yes.

Q. And also the points at which the signals were taken?

A. Yes.

Q. And what was the corresponding humidity sheet called? You can refresh your recollection.

The Court: Step over and look at it if it will help you.

A. Radiosonde Humidity Performance Test.

Q. Sheet?

[fol. 525] A. Yes.

Q. And that contained similar information, did it not?

A. Yes.

Q. What was the corresponding pressure work sheet called?

A. There was no name assigned to it but it is a form that shows the frame number, the levels which we tested at and whether we tested at ambient or cold.

Q. Does it show the signals returned at the different points?

A. Yes.

Q. You testified on cross-examination, did you not, that six samples were customarily taken out of a month's production and tested under the supervision of Messrs. Romanski and Lewis; is that right?

A. Yes.

Q. Did you observe any of that testing?

A. Some of the testing, yes.

Q. Who did you observe actually ran the tests in the course of that testing?

A. In temperature, Viola Faria, in the pressure, Jim Pemberton, and George Faria.

Q. And with respect to humidity?

A. Jim Pemberton.

Q. In October, 1956 did you have any discussion with Fong Foo regarding who was to supervise the test operators?

A. Yes.

Q. And what was the conversation that you had?

[fol. 526] A. I told Fong Foo at that time that I wanted all the tests being performed on the Government samples to be supervised directly by his Quality Control Department while we were not there in the area, or if we were

in the area then they would be supervised by myself and my subordinates.

Q. Now, was this request followed in all respects?

A. No, sir.

Q. In what respect was it not followed?

A. On several occasions when I went into the area I noted that various individuals, Robert Knupp for one, was sitting down running the test, the Government test, on the samples I had selected, and was being submitted to the various tests required.

Q. And did you have any discussion with Fong Foo about that?

A. Yes.

Q. And did you send him any memorandum?

A. Yes.

Q. And did he send you any reply?

A. Yes.

Q. Do you have it?

A. Yes.

Q. Is that a written memorandum?

A. It is a typewritten one.

Q. Will you produce it, please. (The witness complied.) Will you take it out of the folder? When is that memorandum dated?

A. October 30, 1956.

[fol. 527] Q. And in the beginning it states "To all Concerned"?

A. Yes.

Q. And it is from Fong Foo?

A. Yes.

Mr. Caner: I ask that it be marked for identification.

Mr. Angoff: Pardon me. Didn't you ask for both of them? It seems to me Fong Foo's comments—

The Court: I understood you asked for a memorandum which came to Fong Foo, but you got something else back; am I wrong?

Mr. Caner: I asked if there was a memorandum by the witness to Fong Foo, and he said yes. I asked him to produce a memorandum in reply, but I would be happy to introduce both memoranda.

The Court: You had better have both the memorandum and the reply. Government's Exhibit 27 for Identification is the memorandum from Polliotto to Fong Foo. Government's Exhibit 28 for identification is Fong Foo's reply.

(Discussion off the record.)

The Court: Do you object to these?
Mr. Angoff: No, I don't.
The Court: Do you offer them both?
Mr. Caner: I do.
The Court: 27 for Identification is admitted, and 28 for [fol. 528] Identification is admitted, respectively as Exhibits 27 and 28.
Mr. Caner: Mr. Foreman and members of the jury, this is Government's Exhibit 27 which has just been admitted into evidence, and I call to your attention—
Mr. Angoff: May I suggest they be read?
The Court: I think it is a good idea. Will you read 27 through, and 28 through, to the jury, please.
Mr. Caner: Memorandum to Mr. Fong Foo dated October 30, 1956, from C. Palliotto, Subject radiosonde inspection on 43106 PH56. (Readi g)

"During this writer's review of the operation of the radiosonde lines, the following conditions were noted:

1. Control over the charts prepared for the radiosonde was inadequate, wherein duplicate copies of charts have turned up with different readings for the same units.

2. Charts are scattered throughout that open area, where they can easily be misplaced or are available to anyone desiring to use the same.

3. Copies of three different charts covering the same unit were uncovered.

4. During the processing of a quality inspection for [fol. 529] pressure calibration on units selected by Quarep it was noted that this test was being run by a production worker and not by contractor's quality control section.

5. It is recommended that all tests performed on the units selected for quality inspection be run under direct

supervision of the contractor's quality control section, utilizing quality control personnel where practical.

6. Method of preparing and safeguarding of charts be placed under better control.

7. It is requested that this office be notified in writing of your analysis and corrections relative to the above observations and recommendations.

Constanz Palliotto,

The reply memorandum dated October 30, 1956 (reading)

"To all Concerned:

From Fong Foo.

Subject: Standard operating procedure.
Signal Corps Type Test
Cold Pressure Temperature
Humidity Radiosondes

1. General. All units submitted in lot must be accompanied by completed charts.

[fol. 530] 2. With the submission of a lot for type test, all charts must be turned over to the Signal Corps office.

3. Under no circumstances shall there be any duplicate charts and/or any other information which may lead to a prior knowledge of the functioning of the unit.

4. The results and data of all test runs are to be immediately turned over to the Quality Control Department.

5. The actual running of the test shall be done by Production personnel except as follows:

1. All tests shall be supervised by Quality Control and/or the Resident Inspector.

2. The cold-pressure test shall be run under the direct supervision of a quality control inspector. Specifically, this particular test must actually be run by the quality control representative.

6. The decoding and interpretation of all data associated with these tests shall be the function of the quality control

department except in those instances where the resident inspector shall request the same.

In conclusion, these type tests are a requirement of our [fol. 531] contractual obligations and under the appropriate MIL specifications involved, the quality of material must be established before submission to the Government inspector. The function of the quality control department of Standard Coil is to assure that the highest quality level be established and maintained."

And it bears the signature of Fong Foo, and it shows that the copies went to various named persons, S. Aronoff, B. Fisher, A. Graham, D. Groul, R. Knupp, G. Murphy, C. Palliotto, B. Remiers, A. Sawyer.

[fol. 532] Q. Now, on cross-examination you testified, I believe, that there were times when company units were conditioned in the humidity conditioned chamber at a time when the government samples were also in that chamber; is that correct?

A. Yes.

Q. The humidity conditioning chamber is where on the chart, Government's Exhibit 4? Look at the chart, Mr. Palliotto. Where is the chamber to which you referred? Is this it (indicating)?

A. Yes.

Q. In Position E; right?

A. Right.

Q. How many doors did that humidity conditioning chamber have?

A. Two doors.

Q. At the beginning of the contract was the humidity conditioning chamber divided up in any way?

A. No.

Q. Later on was it divided up?

A. Yes.

Q. When was it divided up?

A. The second or third week in August, 1957.

Q. In what way?

A. The chamber was divided into two sections by the use of a wooden and a wire baffle placed between the two chambers so that each door would have its own chamber.

[fol. 533] The Court: You better describe the word "baffle." The Jury may not know it and be baffled.

The Witness: A board and chicken wire was used to separate the two compartments so that if you opened the door from one you could not reach into the other.

Q. And were the different sides of the unit allocated to any particular organization?

A. Yes.

Mr. Angoff: I object, your Honor.

The Court: What is the objection?

Mr. Angoff: Calling for a conclusion. I don't know who is doing the allocating.

The Court: All right. You can ask whether the company allocated and, if so, what.

Q. Did the company allocate one side to any particular organization?

A. Yes.

Q. What?

The Court: Who did it? Which individual representing the company made the allocation?

The Witness: Fong Foo at that time told me that the right section would be reserved for the conditioning of the government samples.

Q. And did he tell you what the left side was to be used for?

A. No, but it was common knowledge what it was used for.

[fol. 534] (Mr. Angoff rises.)

The Court: That may be struck. The answer is he didn't tell you.

The Witness: No, sir.

Q. Did you observe what it was used for?

A. Yes.

Q. What?

A. They were conditioning their hair elements in it.

Q. After this partition had been created did you permit Standard Coil Products to use the government side for

conditioning its units while government samples were in that side?

A. No, sir.

Q. On cross-examination you testified concerning a certain packaging test, did you not?

A. I don't recall what the—

Q. Were you asked questions on cross-examination concerning units which had been returned for testing after packaging?

A. Yes.

Q. Now, who conducted that test?

A. The actual tests were conducted by myself or my subordinates.

Q. And what did you do when you conducted that test?

A. I just subjected them to the operational test to see if they were functioning and they were coding properly and the motor speeds were there, and so forth.

[fol. 535] Q. What is the operational test?

A. That is to insert the power to them and run them through and see if they coded properly.

Q. At what point?

A. At the room conditions existing. Room temperature, room pressure, room humidity.

Q. At any other points?

A. No, sir.

Q. So you did not give them a calibration test, in other words?

A. No, sir.

Mr. Caner: Your witness.

Recross examination.

By Mr. St. Clair:

Q. Mr. Palliotto, do you recall on September 14th my asking you this question: Was there any division made within the chamber to segregate the government's units from the contractor's hair elements? This appears on Page 397 of the transcript, your Honor please.

The Court: Do you recall that question being put to you?

The Witness: No, sir, I don't recall.

Q. Do you recall answering that question as follows: "There was"? Do you recall that?

The Court: I suppose you might show it to him.

Q. I show you Page 397 of the transcript of September [fol. 536] 14th and ask you whether or not it appears, commencing on Line 18, the question: "Was there any division made within the chamber to segregate the government's units from the contractor's hair elements?" Is that correct?

A. Yes.

Q. Does that refresh your recollection that I asked you that question?

A. Yes.

Q. You now remember that?

A. Yes.

Q. And you answered that how?

A. I answered that there was.

Q. That there was a division?

A. Yes.

Q. Then didn't I ask you this question: "Was there ever a time, to your knowledge, when the contractor's side, so to speak, was full and it had to use the government's side to store its hair elements?" Do you remember my asking you that question?

A. Yes.

[fol. 537] Q. And you answered: "A. Yes."

A. Yes.

Q. And then I asked you this question: "And of course under those circumstances the contractor was permitted to get its hair element out of the chamber as necessary, wasn't it?" Do you remember that question?

A. Yes.

Q. And you answered "Ye ", didn't you?

A. Yes.

Q. And I said: "With your knowledge"?

A. Yes.

Q. You said "Yes", is that right?

A. Yes.

Q. Then I said: "With your consent"? You said: "Yes", didn't you?

A. Yes.

Q. So when you just answered a question to Mr. Caner, that you never permitted the contractor to have access to the so-called Government side, that was incorrect, wasn't it?

A. No, sir.

(Mr. Caner rises.)

The Court: What is the objection?

Mr. Caner: That was not the question, your Honor.

The Court: Well, I won't allow you to argue it. But I will allow the question. I overrule your objection. I don't [fol. 538] want it argued in front of the jury. You may put a further question to the witness. It is obvious that Mr. Palliotto thinks he has an explanation.

Q. Can you explain your answers of September 14 in view of your testimony this morning?

A. Yes.

Q. Would you kindly do so?

A. During the time there were Government samples in the chamber that had been selected by myself or my subordinates, there were no other units or hair elements in that chamber at that time. The chamber is locked. When we didn't have our samples in there, and the chamber was available and empty, it was permitted to be used by Standard Coil Products, Incorporated, but at that time it would not be locked.

Q. Did it ever occur that you would store radiosondes that had been selected for testing overnight in this humidity conditioning chamber?

A. Yes.

Q. Did it ever occur during those periods of time there was a surplus number of hair elements that had to be stored in the same humidity chamber that couldn't all be fitted in the contractor's side?

A. I don't recall that occasion happening.

Q. You do not recall that. Could it have happened?

A. No, sir.

[fol. 539] The Court: Anything could have happened, almost anything could have happened.

Q. So that, as I understand it, on every occasion when there were Government units being stored in the humidity chamber you would exclude from the Government's side hair element that belonged to the contractor not yet installed in the machine?

A. Yes, sir.

Q. Do you recall any occasion when hair elements had to be kept outside the conditioner because there was no room in the contractor's side?

A. Yes, sir.

Q. What results when you keep the hair elements outside the conditioner?

A. They have to be conditioned.

Q. Does it despoil them?

A. No, sir.

Q. It does require further conditioning of them, right?

A. Yes, sir.

Q. Can you tell us the frequency within which the Government would store its samples in this conditioner overnight?

A. It would be approximately one lot a day, and sometimes as many as two and three lots we would condition in that chamber.

Q. So that, if I understand your answer correctly, in the [fol. 540] usual course of business there would on every night be Government units being stored in the conditioning chamber?

A. Well, there may have been a day or two that we did not utilize the chamber.

Q. On almost every night then there would be Government units being stored in the humidity conditioning chamber?

A. Yes, sir.

Q. So that as a practical matter there was never any occasion when the Government side was left unlocked and the contractor could use it?

A. Just during the day when we weren't using it.

Q. I mean overnight.

A. No, sir.

Q. So when you were telling us about occasions when it would be empty, and the contractor would be allowed to use it, you were talking about a situation that in fact practically never happened, is that right?

A. No. I would have to review the records to actually establish the amount of lots we subjected to that test.

Q. That is all right, Mr. Palliotto. You can recall no occasion though that you prevented the contractor from removing its hair elements from the humidity conditioning chamber, can you?

A. Not to my knowledge.

Q. Thank you. You knew it was a requirement of the [fol. 541] Government under its contract not to delay testing?

A. Yes, sir.

Q. And not to delay production?

A. Yes, sir.

Q. And if you had forbade the contractor access to the humidity chamber it would have resulted in such delay?

A. Yes, sir.

Q. Thank you. Now you told us a few moments ago about your instructions to Mr. Foo and his reply to them. It is not quite clear in my mind to what these instructions pertained. I take it that without regard to what you told Mr. Foo the tests being conducted by the Government were no less Government tests. Do I make myself clear?

A. No, sir.

Q. I didn't think so. It was not clear to me either. At no time while you were in charge did you permit the contractor to do the Government job, did you?

A. I don't quite follow the question.

Q. You were in overall supervision of the so-called Government test, weren't you?

A. Yes.

Q. The fact that you let company personnel perform them did not in any way relieve you of any ultimate responsibility, did it?

A. No, sir.

[fol. 542] Q. They were always Government tests, in other words?

A. The tests run on my samples, yes.

Q. And the persons you designated were subject to your control and supervision, weren't they?

(Mr. Caner rises.)

The Court: Is that an unfair question?

Mr. Caner: I think it calls for a legal conclusion, your Honor.

The Court: I think it calls for a factual statement as to whether they were subject to his supervision.

Q. Were they subject to your supervision?

A. I couldn't answer that.

Q. Do you know what the word "supervision" means?

A. Yes.

Q. Now can't you answer the question?

A. No, I couldn't.

The Court: Did you give them orders?

The Witness: Not all personnel. I made recommendations, I wouldn't say "orders", sir; recommendations, yes.

Q. That is a nice way of handling it. You expected those "recommendations" to be carried out, didn't you?

A. Yes.

Q. They were your units being tested, right?

A. On my samples, yes.

[fol. 543] Q. You were responsible for them as the Government inspector, weren't you?

A. Yes.

[fol. 544] Q. And if you saw anybody doing anything wrong, you had them correct it, didn't you?

A. Yes.

Q. Whether you recommended it, ordered it, or did it yourself?

A. Yes.

Q. Now, as I understand it, your talk with Fong Foo had in substance about this effect, you recognized there may be occasions when you may not be on the floor during the conduct of these tests?

A. Yes.

Q. And there may not be available a subordinate, a direct subordinate of yours, to supervise the test; is that right?

A. Yes.

Q. And so, as I understand it, you in effect deputized Mr. Foo to serve in your place? Do you know what deputize means?

The Court: Well, he does, but maybe not every member of the jury does.

Q. In effect, you appointed Mr. Foo to serve in your place if you or your subordinate were not present; is that right?

A. I couldn't actually say I appointed him.

The Court: You named him?

Q. You asked him to do it, didn't you?

A. Yes.

Q. And this was very early in your experience in this company; it was in October of 1956, wasn't it?

[fol. 545] A. Yes.

Q. And in the conduct of these tests of course, in the main, whether Mr. Foo was there or not, you recognized they were all subject to your overall supervision; isn't that right?

A. Yes.

Q. And you had a right to ask Mr. Foo to kind of fill in for you, didn't you?

A. Yes.

Q. And in fact then he was working for the government, wasn't he?

Mr. Caner: Now, your Honor.

The Court: Well, I don't know whether that hasn't got a mixed law and fact aspect; I am going to sustain the objection.

Q. Now, you received, I take it, this memorandum of October 30 which has been marked as Government's Exhibit 28, I understand, did you not?

A. Yes, sir.

Q. Did you take any issue with the provisions contained in this exhibit when you received it, Exhibit 28?

A. No, sir.

Q. You were satisfied as a QAR representative that it set forth what you were willing to permit happen on your tests; is that right?

A. Yes.

Q. I call your attention to No. 5, which reads as follows:

[fol. 546] "The actual running of the test shall be done by production personnel except as follows"—

have I read that correctly?

A. Yes.

Q. So that you knew that persons that were employed by Standard Coil as production personnel were going to be used from time to time to conduct the government tests, didn't you?

A. Yes.

Q. And you took no exception to that, did you?

A. Not at that time, no, sir.

Q. And when you saw Mr. Knupp performing these government tests, then, that was in accordance with the instructions that you had approved, wasn't it?

A. No, sir.

Q. In what respect was it not in accord?

A. The production personnel on that particular test that I am talking about was not Robert Knupp.

Q. Which test was it?

A. That was a temperature test.

Q. Well, the only exception to the rule set down as No. 5 are, one, that all tests shall be supervised by quality control and/or the resident inspector, right?

A. Yes.

Q. So that wouldn't exclude Mr. Knupp from running a [fol. 547] test, would it? (Witness examines document.)

Q. No, just would it?

The Witness: Mr. Knupp—

The Court: Would it?

The Witness: Yes.

Q. The first exception says that all tests shall be supervised—that doesn't exclude Mr. Knupp from running a test does it?

A. Mr. Knupp was not a quality control man at that time.

Q. No, but No. 5 says the actual running of a test shall be done by production personnel?

A. Yes, as agreed to between Mr. Fong Foo and myself.

Q. And Mr. Knupp was production personnel, wasn't he?

A. You can say he was production personnel, yes.

Q. Well, he was, not just that I can say; he was, wasn't he?

A. Yes, at that time.

Q. And so these instructions in writing which you approved permitted Mr. Knupp to perform the tests for the government, didn't they?

A. No, sir. This was discussed with Fong Foo previously.

Q. You mean there was some discussion not contained in Exhibit 28?

A. Yes, sir.

Q. Was that before Exhibit 28 was received by you?

A. Yes, sir.

Q. But it wasn't included in Exhibit 28, was it?

[fol. 548] A. No, it had been agreed to.

Q. Well, you approved Exhibit 28 when you received it, didn't you?

A. Yes, sir.

Q. And so as far as anybody can now testify, Mr. Knupp was authorized to perform the test, wasn't he?

A. Yes, sir.

Q. Thank you. And this was a government test, wasn't it?

A. Yes, sir.

Q. And this wasn't too unreasonable, was it? This was in October of 1956?

A. Correct.

Q. You had had approximately a little more than five days training on these units, didn't you?

A. No.

Q. But the personnel you sent were generally inexperienced?

A. I didn't say that.

Q. But you knew that Mr. Knupp had been familiar with radiosondes in California?

A. Yes.

Q. And he knew as much about them as anybody on the premises, didn't he?

A. Yes.

Q. And so in October 1956, when the performance of this contract was just commencing, it wasn't unusual to

[fol. 549] have somebody who knew something about it perform the test, was it?

A. No.

Q. And you were informed in writing that such personnel would in fact perform the test, and you approved it, didn't you?

A. Yes.

Mr. St. Clair: Now, I think I have only—may I have just a moment, your Honor?

The Court: Surely.

(Conference between counsel.)

Mr. St. Clair: No further questions.

The Court: Mr. Angoff?

Mr. Angoff: Yes.

Recross examination.

By Mr. Angoff:

Q. Did you say that Fong Foo didn't ask you to make personnel inspections?

A. That is what I said, yes.

Q. You said that today?

A. Yes.

Q. I now direct your attention to the stenographic record in this case, Volume 5, at Page 461, starting with Line 1 (reading):

"Q. Now, before we leave Fong Foo a moment, you have testified yesterday, I believe, that Fong Foo submitted various submission sheets; is that correct?

A. Yes.

[fol. 550] Q. On Page 176 (reading):

'Fong Foo told me that the material was ready for inspection and that they would like to have the inspection by myself and I in turn told Fong Foo that if the material was ready for the government inspection to submit that on a submittal sheet.'"

You read that with me, didn't you?

A. Yes.

Q. First he asked you to inspect it yourself, didn't he?
A. Yes.
Q. What did you answer?
A. I said Yes.
Q. Were you wrong when you said that the other day?
A. Not at that time, no.
Q. Did you change your mind since?
A. In relationship to that, I would have to qualify why the Yes answer was given.
Q. On Page 462—I will come back to your qualification—the top line, Line 1 (reading):

"Q. Did I ask you the first time whether or not Fong Foo asked you to inspect these lots yourself?
A. Yes.
[fol. 551] Q. What did you answer the first time?
A. I says Yes."

Do you remember that?
A. Yes.
Q. Now, the other day you wanted to change the answer, did you not?
A. I don't recall.
Q. Well, what change do you want to make today?
A. At this time I was at the plant all alone, and I couldn't ask anyone else to inspect the material but myself.
Q. Today did you give a flat answer without limitation or exception that Fong Foo didn't ask you to inspect yourself? Didn't you give that answer?
A. Not personally, no.
Q. I will go on to another question—oh, by the way, on this humidity chamber where you put the wire baffle, is that chicken wire?
A. Yes.
Q. That room was open right on the floor originally, wasn't it?
A. Which room are you talking about?
Q. The humidity room, the humidity chamber; no barrier of any kind; is that correct?
A. No, sir.
Q. Sometime in August or September of 1957 you had a talk with Fong Foo, did you not?
[fol. 552] A. Yes, sir.

Q. About the humidity chamber?

A. Yes, sir.

Q. Wasn't it Fong Foo who told you to build barriers, get a key and lock yourself up?

A. Yes, sir.

Q. Did he say, "I will go with you and get a rare key with an unusual lock and we will lock this stuff up"?

A. He didn't say a rare key.

Q. What did he say?

A. He said, "I will get you a lock and a key."

Q. And didn't you refuse?

A. At that particular time I did.

Q. He begged you to lock that place up, didn't he?

A. Originally, yes.

Q. Why didn't you?

A. Because in the same discussion he begged me after 15 or 20 minutes—we discussed the problem and it was agreed he would give me a key and the chamber would be locked, and I went along with him.

Q. Did you get the key yourself?

A. No, sir, he gave me the lock and key.

Q. Didn't you go and get it yourself?

A. No, sir.

Q. Why did you refuse?

[fol. 553] A. In the initial part of the discussion, I refused.

Q. You always refused initially, did you not?

A. No, sir.

Q. Didn't he also ask you to get something solid other than a wire baffle or a chicken wire?

A. Not that I recall.

Q. Are you the one that got the wire baffle?

A. No, sir.

Q. Who got the wire baffle?

A. The Standard Coil Products personnel.

Q. Who?

A. I don't recall who the man was.

Q. At any rate, we will leave it that way, it was Fong Foo who suggested that you enclose that humidity chamber; isn't that right?

A. Yes.

Q. Did you ever tell that to the government?

The Court: I don't know who the government is.

Q. Did you ever tell it to the grand jury?

A. I don't recall what my testimony was to the grand jury right now.

Q. Now, isn't this correct, all type testing, all calibration testing, from the time you first got to the North Dighton plant until at least after October 1, 1957, was completely under your supervision and control?

[fol. 554] A. No, sir.

Q. Didn't you tell us that the other day in the District Attorney's office when I asked you that same question?

A. I don't—

Q. Well, let's start all over again. Was all type testing under the control of yourself from October 1956 at least until after October 1, 1957?

A. No, sir.

Q. Didn't you say that to us the other day?

A. I don't recall.

Q. Do you remember my asking you that question in the presence of Mr. Mitchell?

A. I don't recall the question the other day.

Q. Was there a change in control after October 1, 1957 when Shapiro came to town?

Mr. Caner: I object to the question, your Honor. I don't understand what the word control means.

The Court: I will overrule the objection.

The Witness: Will you be more specific on this change?

Q. Well, you know what I mean. What was the situation before Shapiro came down, and what was the situation afterwards?

A. Before Shapiro, Leo Shapiro came to visit the plant, the material was being submitted to me direct, or to my subordinates direct, for government testing. Then after [fol. 555] October 1957, in the procedure setup, and agreed to by the personnel of the Standard Coil, the material would be subjected to the same test the government did. And if the results showed that the material was all acceptable to us, then it would be submitted for government acceptance to myself or my subordinates.

Q. Wasn't this the situation? From the time you came to the plant until after October 1, 1957, and that is about the time Mr. Shapiro came to the plant, you or your subordinates had complete control of inspection; is that correct?

A. Inspection of government samples.

Q. Yes. Afterwards quality control was asked to make preliminary inspections?

A. Yes, sir.

Q. And then you would make actual inspection?

A. Yes, sir.

Q. So that the situation is this, you had complete control at all times; is that correct?

A. Only on government tests, with the exception—I would have to qualify that answer.

Q. Go ahead.

A. With the exception of a period in October 1956 and going into November 1956, and possibly a week in December where some lots were inspected by Standard Coil Products Incorporated personnel. These samples were not selected by myself.

[fol. 556] Q. You mean the early samples?

A. Yes.

Q. But after that the situation is as I described it and you accepted it, namely, that all government tests were under your complete control from October 1, 1956, to October 1957?

A. Yes, they were under my supervision or my subordinates' supervision.

Q. And at no time were they under the control of the quality control department headed by Fong Foo; isn't that right?

A. Not at that time, no.

Q. At no time—first you say not at that time; you mean from October 1956 to October 1957?

A. No, I just stated that in October and November 1956 some lots were run under Standard Coil Quality Control Department without my supervision.

Q. With the possible exception of those few, at no time in that period October 1, 1956 to October 1957 was the

quality control department of Standard Coil, headed by Fong Foo, in charge of the government tests?

A. Yes, sir, when we were not in the area.

Q. Aside from when you were not in the area, what is the situation? Do you want to hedge any more?

A. I myself or my subordinates would have supervision of the tests.

Q. And even when you were not in the area, you had [fol. 557] control of all these tests?

A. Indirect supervision, yes.

Q. Now, every one of these submittals had to be signed by you or one of your men; is that right?

A. Yes.

Q. And they were all signed, weren't they?

A. Yes.

Q. Including you yourself on many occasions; is that right?

A. Yes.

Q. Now, with respect to Defendant's Exhibits D and E for Identification, remember the other day I asked you if you signed any of these?

A. Yes.

Q. And you did, didn't you?

A. One, I believe.

Q. And if you didn't sign them, one of your inspectors had to sign, is that correct?

A. None of my inspectors signed any of these sheets.

Q. Who would in your place?

A. No one.

Q. You mean that the sheets could go out with that on it, without a signature?

A. The sheets originated by myself would be signed by myself.

Q. So that every sheet dealing with an inspection at Standard Coil had to be signed by yourself?

[fol. 558] A. You will have to specify what sheets, now.

Q. I am showing them to you.

A. The DD 250's, yes, I would sign all of those that left my plant.

Q. And there were hundreds of them?

A. No, sir.

Q. Scores?

A. No, sir.

Q. Each lot had to have one of these sheets?

A. No, sir.

Q. And if they were not signed by you, then the naval inspector had to sign them?

A. Yes, sir.

Q. So that a government inspector had to sign these sheets at all times?

A. Yes, sir.

[fol. 559] Q. And they would contain in every case the following, and I will read it, "I certify that the items listed herein have been inspected by me or under my supervision, they conform to the contract"—what does that say?

A. It is crossed out.

Q. —"and has been accepted"—

A. That is crossed out too.

Q. They conform to the contract except as noted. Right?

A. Yes.

Mr. Angoff: I offer in evidence Defendant's Exhibit E for Identification.

Mr. Mitchell: Is it D for Identification?

The Court: E for Identification is the white paper dated 11/22/57.

Mr. Angoff: It is just the other way round.

The Court: Not in my book. 12/24/57 is D for Identification.

Mr. Angoff: Correct.

The Court: 11/22/57 is E for Identification.

Mr. Angoff: Right.

The Court: Are both offered?

Mr. Angoff: Yes.

Mr. Caner: Objection.

The Court: What is the ground of the objection?

Mr. Caner: I don't see their relevancy. Moreover they [fol. 560] are hearsay.

The Court: They are admitted. They are not offered for the truth of the matter asserted but for other purposes.

Mr. Angoff: And may we have one moment, please, and then I may be through?

(A pause.)

Q. The Naval inspector was a Mr. Wolf in most cases?
A. I believe the name Wolf— It was a Miss.
Q. Miss Wolf?
A. Miss Wolf.
Q. I didn't know.
A. I didn't know her. She was in the Boston area.
Q. All right. In addition to signing the submission, in addition to signing Defendant's Exhibit D and E, you also had a Government stamp with an eagle on it, did you not?
A. Yes.

(Document formerly marked Defendant's D and E for identification received in evidence.)

Q. Every single item that left Dighton or North Dighton had to have that eagle?
A. Yes.
Q. It was stamped by you or your subordinates?
A. Yes.
Q. That eagle stood for what?
[fol. 561] A. That the material had been accepted.
Q. Thank you very much.

Mr. Angoff: That is all.

Further redirect examination.

By Mr. Caner:

Q. Mr. Palliotto, you stated that you had a discussion with Fong Foo concerning the matter appearing in the October 30 memorandum?
A. Yes.
Q. What discussion did you have with Fong Foo?

Mr. St. Clair: I object. This was reduced to writing, accepted by him, and he is now seeking to perhaps bury it, and I think it is inadmissible.

The Court: It is not a contract. Therefore, I would say it is admissible. But I would be very surprised if the jury were to conclude that oral discussions continued to be effective as a working arrangement when a subsequent writing was drawn up and not objected to. It seems to me to be up to the jury and not up to the Court.

Q. What discussion did you have?

A. Well, I told Fong Foo at that time I had observed Mr. Knupp running several of my tests under Temperature, especially, and in view of the fact that Fong Foo had told me that Viola Faria would be given that job, and she [fol. 562] would run the job, and he had been running it, Mary Genaro would perform the tests and Knupp would not be doing any of the tests, and I walked into the area and I saw him, so I objected to Fong, and he said he would correct the situation and would keep the supervisors away from the actual running of the tests.

The Court: Was all this conversation prior to the memorandum?

The Witness: Yes, sir. It took place on more than one occasion.

The Court: No. I am asking you whether this conversation you are talking about was prior to the memorandum. Remember that you have already testified earlier in this proceeding about conversation prior to the memorandum at that time, none of which you are now saying was included in your testimony. I have reminded you not once but a great many times in the course of this trial how important it is in justice to the defendants individually and to the defendant-corporation and the Government that you should tell the truth, the whole truth and nothing but the truth. You earlier were asked about the conversation which took place before the written memorandum, and you now are giving on a re-direct examination testimony which you did not earlier give in the case. I am now going to have to open this up to a further re-cross-examination because you are amplifying your testimony in a way you [fol. 563] did not originally.

Now have you any explanation for why your memory suddenly expands as the case goes on or varies from time to time? Have you a poor memory?

The Witness: Sir, possibly, yes, but not generally, no.

The Court: Are you aware, as I have tried to remind you, of the sanctity of your oath?

The Witness: I am aware of it, sir.

The Court: Are you aware that you were previously asked this very question as to what the conversations were before the memorandum?

The Witness: Yes.

The Court: Are you aware that you answered in one sentence?

The Witness: I believe I was stating the conversations, sir. I don't know if it was one sentence or not.

The Court: Are you now conscious that you are giving us a great deal of detail, if I may call it that, which certainly changes the total picture from what your one sentence or two sentence summary previously indicated?

The Witness: Yes, sir.

The Court: How do you explain how day after day, for five or six days, you continuously fail to live up to what I have reminded you is the duty of a witness? Have [fol. 564] you any explanation? Are you under medical treatment of any kind?

The Witness: No, sir. Some of these questions I can't answer unless I go into detail, sir.

The Court: Well, I don't know that anybody has ever excused you from going into detail, if a detail answer is necessary. You have here two men being charged with one of the most serious crimes in the Federal Statutes. They are being tried for a case which, if they lose, and are convicted, it is common for the Government to ask for a jail sentence. Their liberty is at stake. They are here on one of the most solemn days of their lives, and so are you. It is no less solemn to be a witness in a criminal proceeding, I would almost say, than to be a defendant, for you are being called upon to give testimony on which the liberty of other men will depend.

I doubt very much if anything that you have ever done in your life is more important. And not once but I would say the record will show ten times I have admonished you, and warned you and reminded you of the solemnity of this occasion.

I am now going to take a recess and give you a little chance to reflect before I allow you to testify any further. I warn you that you are not only under an oath to God

but you are under the sanctions of the perjury statutes of the United States.

(Recess.)

[fol. 565] The Court: You may proceed with the examination.

Q. Mr. Angoff asked you about initially refusing to put on a lock and key, that is on the humidity conditioning chamber, on the Government side, is that right?

A. Yes.

Q. Why did you so refuse?

A. Well, I wanted—we had sufficient time during the day to condition some of these units and run a test during the day, and at this time we were having the problem, I don't recall what it was—so I desired to run the actual conditioning and the tests during the daytime while I would be there or one of my subordinates would be right in the area. I talked to my office, and they were a little puzzled also. So then we agreed with Fong to put the lock on and he supplied the lock.

Q. And the lock would be on overnight?

A. Yes.

Q. When you were not there?

A. Yes.

Mr. Caner: That is all.

The Court: Is there anything else?

Mr. St. Clair: No further questions.

Mr. Angoff: Just one.

[fol. 566] Re-recross examination.

By Mr. Angoff:

Q. With whom did you talk to in your office?

The Court: With whom did you talk?

Mr. Angoff: I am sorry.

Q. With whom did you talk?

A. Mr. Leo Shapiro, my supervisor.

Q. When was that?

A. That would be in the period of the last week of August or so; I couldn't tell you the exact date it was.

Q. He was puzzled?

A. Yes—why the question came up relative to conditioning the units overnight.

Q. When did you get the lock?

A. The lock was given to me and placed on the chamber the first week in September, the 4th or 5th of September, that evening, and I don't know which of the two nights.

Q. Who placed the lock on it?

A. I personally placed the lock on.

Mr. Caner: That is all.

The Court: You are to remain here because the parties may want to call you for testimony on another matter. You do not have to remain in the court room but you have to remain available.

The Witness: Can I stay in the court room?

[fol. 567] The Court: You may, if you like.

The Witness: Yes.

Mr. St. Clair: If your Honor please, if he is to testify further on direct, on another aspect of the case, his presence in the court room I think might be in violation of the rule.

The Court: All right. I think there is something to that. You are not to stay in the court room but you are to be available in view of the fact some other witnesses may testify on the very subject matter which you are later to cover and you are not to be here during that testimony. You are therefore not to be in the court room but you are to be ready.

The Witness: Yes, sir.

The Court: The next witness, please.

Mr. Caner: Mr. Fisher.

(The Clerk administers the oath to Mr. Fisher.)

The Court: You said, "I do"?

The Witness: "I do."

BERNE FISHER, Sworn

Direct examination.

By Mr. Caner:

Q. What is your name?
A. Berne Fisher.
[fol. 568] Q. Where do you live?
A. Arcadia, California.
Q. By whom are you employed at the present time?
A. Teller Computing Corporation.
Q. How long have you been employed by them?
A. About three years.
Q. Previous to that were you employed by Standard Coil Products, Inc.?
A. Yes, I was.
Q. Yes, you were?
A. I was.
Q. For how long?
A. For a period of about five years.
Q. And you were employed, first, in Califor[illegible]?
A. That is true.
Q. Then you came to North Dighton?
A. Yes.
Q. What was your position in North Dighton?
A. General manager.
Q. Of what?
A. Of the Tuner Division and the Servotronics Division.
Q. Of Standard Coil, the North Dighton plant?
A. That is right.
Q. Who was the head of the Quality Control Department of the Servotronics Division?
[fol. 569] A. Mr. Foo.
Q. Do you recognize him in the court room?
A. Yes.
Q. Will you point him out?
A. There (indicating).

Mr. Caner: May the record show the witness has designated the defendant Foo.

Q. Did you know a Robert Knupp?

A. Yes, I did.

Q. What were his duties?

A. As I recall, he was foreman of the tests on radiosondes.

Q. I show you—

(Messrs. Caner and Mitchell confer with the Clerk.)

The Court: You are now being asked about Exhibit 5 for Identification.

Q. I show you Exhibit 5 for Identification.

The Court: I see there your name is spelled "F-i-s-c-h-e-r." Is that correct?

The Witness: That is incorrect. It is F-i-s-h-e-r. There is no "c".

The Court: That is not a good way to begin a chart. Is your first name B-e-r-n-e or B-e-r-n-a-r-d?

The Witness: B-e-r-n-e, like the capitol of Switzerland. [fol. 570] The Court: Is that your legal name?

The Witness: My legal name, yes, sir.

Q. I call your attention to the fact Government's Exhibit 5 is in two parts, a chart labeled Pre-June 1957 and a chart labeled After June 1957. Will you look over that exhibit and tell us if that exhibit accurately shows the corporate organization?

The Court: Well, I don't think you can answer that very quickly. I want you to look very carefully because it may turn out that each item on this is important. If I understood correctly your own description of your own title, you never were plant manager, am I right?

The Witness: That is right, sir.

The Court: Therefore, the first part of the chart is wrong, is it not?

The Witness: That is true.

The Court: We don't have to spend any time at all on the chart. It is wrong.

Mr. St. Clair: I move to strike Exhibit 5.

Mr. Caner: Excuse me. He must have misunderstood the question.

Q. You testified that you were plant manager?

The Court: No, he didn't.

The Witness: General manager.

The Court: And only of two divisions, is that correct?

[fol. 571] The Witness: That is right.

The Court: The thing is not admissible.

Mr. Caner: Only two divisions are shown, your Honor.

The Court: I don't care. He is incorrectly described.

Q. You were general manager at the plant?

A. Yes.

The Court: General manager of the plant?

The Witness: Of the plant, of the operation, the divisions.

The Court: Just a moment. General manager of the plant or of two divisions?

The Witness: General manager of the two divisions.

The Court: All right. Now I am not going to allow an exhibit in which on its first entry is not correct. This is a mere chalk (sic) done by an incorrectly informed or otherwise inaccurate aide to the prosecution. I am not saying which one, or either of you, had anything to do with it. That isn't taken out of the Government file but is a chalk. (sic)

Mr. Caner: That is right, your Honor.

The Court: It is not to be used.

[fol. 572] Q. You were general manager of the Servotronics Division, were you not?

A. Yes.

Q. What did that Servotronics Division do?

A. The Servotronics Division was the division that had to do with the military contracts, prime contracts and subcontracts.

Q. And the Tuner Division was what?

A. A commercial division to produce television tuners.

Q. Were there any other divisions of the plant?

A. Just two divisions.

Q. The Tuner and the Servotronics Divisions?

A. That is true.

Q. Well, how many departments were there in the Servotronics Division?

A. I think I can call them off for you. There was a Production Department, Engineering Department, Sales and Contract Department, Quality Control, Maintenance Department.

Q. Do you mean a Quality Control Department and Maintenance Department?

A. That is right. I think this is it.

Q. And what did the Production Department do?

A. Pretty much what its name designates. They produced, they built the equipment.

Q. What did the Quality Control Department do?

[fol. 573] A. Quality Control was the Quality Assurance Department that inspected it and sold it to the Government.

Q. Who was the head of the Production Department?

The Court: Wait a minute. "Inspected" and what, did you say?

The Witness: And conducted the final sale.

The Court: Did you say inspected and sold it to the Government?

The Witness: That is right.

The Court: You don't want to stand on that, do you?

The Witness: This is generally used in the vernacular.

The Court: The word "sale" means to enter into a contract—

The Witness: No.

The Court: —for sale and delivery. You don't mean that, do you?

The Witness: No. This is a vernacular term.

The Court: Let us stay within language that is technically accurate. Inspected and transferred physical possession?

The Witness: He performed the final acceptance tests.

[fol. 574] The Court: I think you had better be very careful. The language here is of the gravest significance. What does the Quality Control Department do under your direction?

The Witness: They perform the inspection function.

The Court: For whom?

The Witness: For the company.

The Court: All right. What else?

The Witness: Well, basically everything else comes under—

The Court: You say nothing if they did nothing else.

The Witness: This is it.

The Court: All right.

Q. When a lot was ready to be submitted to the government, who submitted it?

A. This was submitted, I believe, for the quality control group.

Q. Quality Control Department?

A. That is right.

Q. And who was the head of the department?

A. Mr. Foo.

Q. And who was the head of the Production Department?

A. Mr. Gramm.

Q. Who was Mr. Gramm's superior?

A. I was.

Q. Was there any superior between you and Mr. Gramm? [fol. 575] A. No, sir, none.

Q. Who was Mr. Foo's superior?

A. I was Mr. Foo's superior.

Q. Was there any superior between you and Mr. Foo?

A. There was none.

Q. Now, what was the position of Robert Knupp at the beginning of the contract under which radiosondes were produced?

A. In the beginning? You mean what time?

Q. I have reference to October 1956.

A. I am not sure of this; I think he was in charge of the test for the production department.

The Court: Now, when you say you are not sure, have you any degree of abiding certainty which warrants the consideration of your testimony in a criminal case?

The Witness: This has been three years ago.

The Court: Well, I am just asking you, do you have that degree of certainty? Because if not, it is not admissible. You have to have that kind of certainty in your testimony which enables you to swear under oath that it is true. And I am leaving it up to you. I don't know how much certainty you have.

The Witness: I think it is true.

The Court: You would be willing to have a man's liberty turn on the evidence?

The Witness: That is right.

The Court: All right.

[fol. 576] Q. And what were his duties in that capacity?

A. To perform the tests as prescribed by the government contract and our engineering department.

Q. What tests were those?

A. I am not familiar in detail with the tests.

Q. Well, what did he have to do in connection with production, if anything?

A. This was his production function at that time.

Q. At what time?

A. In October.

Q. Now, did there come a time when his duties changed?

A. Sometime later I believe he became foreman of a line.

The Court: About when?

The Witness: This I am not certain of the date.

The Court: Well, can you tell us what year?

The Witness: I can't even be sure whether it is 1956 or 1957.

The Court: You mean it was in the winter but you don't know whether it was December or January?

The Witness: This is true. I was under a lot of stress at that time.

The Court: The defendants are under a great deal of stress now.

The Witness: I understand that.

The Court: All right, if you don't know, say so.

[fol. 577] The Witness: I don't know.

Q. Well, do you know whether it was in the winter of 1956 or 1957?

A. I just said I didn't know.

The Court: If he doesn't know, he doesn't know, and you can't cross-examine your own witness.

Q. Did there come a time when his duties did change, however?

A. That is right.

Q. And after his duties changed, what did his duties become?

A. He was responsible for the production of the radiosonde.

The Court: What does that mean?

The Witness: He was a supervisor in charge of production on the radiosonde line.

The Court: Well, if I understood you previously, you said Mr. Gramm was production manager of the production department. Now, I know nothing about the matter except as you have told it. I would have thought that the production manager was responsible for overall production, including but not exclusive or limited to radiosondes. Have I misunderstood?

The Witness: No, you haven't.

The Court: Then all right. The responsibility of Gramm is the all embracing responsibility.

The Witness: This is true.

The Court: Nobody else has the all embracing responsibility?

[fol. 578] The Witness: This is true. Mr. Knupp was responsible to Mr. Gramm.

Q. And was Mr. Gramm responsible for the production of other items besides radiosondes?

A. Yes, he was.

Q. Do you remember what items.

A. We had camera control equipment, an after temperature indicator for the jet planes, motors, sink (sic) rollers, and some miscellaneous small parts that I don't recall.

Q. Now, did you have foremen in charge of those devices?

A. Yes, we did.

The Court: Are they called foremen?

The Witness: Supervisors.

Q. Did you describe Knupp as a foreman in your previous testimony?

A. The word is used quite loosely, sometimes foreman, sometimes supervisor.

Q. Well, is there any difference between what he actually does and what he is called?

A. No difference.

Q. Will you tell us what Knupp did as a foreman or supervisor?

The Court: Now I am mixed up as to what date you are asking him about. Are you asking about 1956 or late 1957?

Mr. Caner: After the change had occurred.

The Court: Will you agree that the change had occurred, [fol. 579] at any rate, by the middle of 1957?

The Witness: I will agree to that, yes.

The Court: It may have occurred much earlier, but it had occurred by then?

The Witness: That is true.

The Court: Now you are being asked about the situation in the middle of 1957, bearing in mind the situation may have existed for some time before.

The Witness: Yes.

The Court: Go ahead.

Q. What were his duties at that time?

A. It was his duty to be certain that his material and operations and people produced the given quantity of radiosondes per schedule.

The Court: Now, let's be clear, because I think the chain of command on the organizational chart may or may not turn out to be important. Mr. Knupp had a superior, did he?

The Witness: Yes, he did.

The Court: Who was that?

The Witness: Mr. Gramm.

Q. Was there any intervening person?

The Witness: There was in 1956, I believe.

The Court: You are now being asked about the summer of 1957.

Q. This I cannot be sure of, your Honor.

[fol. 580] The Court: Now, think.

The Witness: I believe he reported directly to Mr. Gramm, although there was another man in there at the time as a trouble-shooter, a part time situation. This is why there is confusion in my mind.

The Court: Did you ever hear of a man called St. Onge?

The Witness: He is the man I am thinking of.

The Court: What was his title?

The Witness: He was used by Mr. Gramm—

The Court: What was his title?

The Witness: I don't know.

The Court: All I can say is that this chalk (sic) in front of me has a lot on it that isn't in the witness' mind.

Q. Well, what did Mr. St. Onge do.

A. Mr. St. Onge was used by Mr. Gramm as a trouble-shooter.

The Court: Now, a trouble-shooter, if I understand that description, means somebody that is not in the organizational chain of command, but is a kind of assistant to somebody who goes around and checks up on people who are in the chain of command; is that right?

The Witness: We use the term staff rather than line.

The Court: He is not a part of the organization known as "staff"?

[fol. 581] The Witness: That is true.

The Court: He is an assistant who is an inspector, and may have work under the direction of somebody who is in the staff?

The Witness: That is true. At times he may be assigned to a line duty as part of his trouble-shooting.

The Court: Is there any difference between line and staff?

The Witness: Yes. Staff is purely supervisory. Line is the actual operation itself.

The Court: The chief of staff is the head of the supervisors?

The Witness: I am not talking about the military.

The Court: No, I am trying to find out about your organization.

The Witness: In our organization the staff advises,

writes reports, gathers facts, data. People in the line execute the operation, they do the work.

The Court: Now, you have told us about Mr. Gramm being the production manager. Is he in the line, or on the staff?

The Witness: He was right on the line.

The Court: Now we have got the line down. You were at the top of the line, weren't you?

The Witness: That is right.

[fol. 582] The Court: As you go down the line from you, you strike Mr. Gramm?

The Witness: True.

The Court: Mr. Gramm is called production manager?

The Witness: That is right.

The Court: Now, following the line down, who is below him?

The Witness: Below him were the actual supervisors.

The Court: Nobody in between?

The Witness: Nobody in between.

The Court: Give us the names of the supervisors.

The Witness: Murphy was one.

The Court: What did he do?

The Witness: He ran a couple of lines. He was supervisor of production lines.

The Court: Anything to do with radiosondes?

The Witness: At one time he had a lot to do with radiosondes.

The Court: In the summer of 1957?

The Witness: In the summer of 1957 I believe he was not on radiosondes.

The Court: All right, then, leave him out. We will take the man below Mr. Gramm on the line which has to do with radiosondes. Who is on the line below?

The Witness: At that time it was Mr. Knupp.

[fol. 583] The Court: And he was called what?

The Witness: Supervisor.

The Court: Which equals foreman?

The Witness: Yes.

The Court: Well, we have got it now, and that shows the chart in front of me is in another respect inaccurate.

Mr. Caner: I will withdraw the chart. The witness has testified.

Q. Now, you testified you came from California, did you not?

A. Yes.

Q. And who came from California with you?

The Court: Today, yesterday, or when? You are asking a question on the physical transportation, or something else?

Mr. Caner: I will withdraw the question.

The Court: All right.

Q. Prior to coming to North Dighton, you worked for Standard Coil in California, did you not?

A. Yes.

Q. And when you came to North Dighton to the plant there from California, did any other persons who had previously worked in California for Standard Coil come with you?

A. Yes, they did.

Q. Do you remember who they were?

A. Mr. Knupp, Mr. Foo, Mr. Graul, Mr. Reniers. We [fol. 584] also had four or five people come in on a temporary basis.

The Court: No, the question is which persons employed or acting for the company in California, who came to Massachusetts in 1956 and 1957, stayed?

Mr. Caner: 1956, your Honor.

The Witness: As a permanent transfer?

Q. Well, will you first tell us all the people who came, and then tell us which ones came permanently?

A. Well, there was Mr. Wilson, Mr. Fletcher, two Mr. Aronoff's, father and son.

Mr. Angoff: Not me.

The Court: Aronoff, not Angoff. Have you changed your name?

Mr. Angoff: No.

The Witness: I can't recall any others.

Q. Does the name Larson mean anything to you?

A. He came in temporarily for a few months.

The Court: Did he come from California?
The Witness: He came from California.

Q. Have you finished?
A. Yes.
Q. Now, would you tell us of those who remained permanently?
A. Mr. Graul, Mr. Knupp, Mr. Foo, Mr. Wilson, the Arnoff's, Mr. Fletcher, Mr. Reniers.
Q. What was the position of Mr. Graul?
[fol. 585] A. At what time?
Q. Starting in October what was his position?

The Court: We are back in 1956.
The Witness: Mr. Graul was part of our sales engineering—
The Court: No, a little more accurately can you tell us?
The Witness: He was contract administrator of the sales department.
The Court: Is that the title he had?
The Witness: I don't recall his actual title, your Honor.
The Court: Did he have a superior?
The Witness: He worked for Mr. Reniers at the time.
The Court: What was Mr. Reniers' title?
The Witness: Mr. Reniers was sales manager.
The Court: And he was called sales manager in charge of government contracts?
The Witness: Yes.
The Court: And what was Mr. Graul called?
The Witness: I think he was assistant sales manager.
The Court: So he was called assistant manager?
The Witness: I believe so.

Q. And was he later called something else?

The Court: Well, by later, what year? 1957?

[fol. 586] Q. Well, do you remember whether his position changed?
A. His position changed.
Q. Do you remember when?
A. 1957 Mr. Aronoff, who was our chief engineer—

The Court: No, don't go into all that. Do you remember what changed in 1957?

The Witness: Yes.

Q. And what was the change that was made then?

A. He replaced Mr. Aronoff as chief engineer.

The Court: Chief of engineering?

The Witness: Chief of engineering of Servotronics Division.

Q. And as such did he have anything to do with radiosondes?

A. Only in an engineering capacity.

The Court: That doesn't help me very much. What does that mean?

The Witness: He provided all the paper work, such as blueprints, interpretation of new problems, technical problems. It is a sustaining engineering effort to be sure that there are no technical problems in the production group.

The Court: I am not sure I quite understood your testimony. He was responsible in respect to the blueprints, right?

The Witness: Blueprints, specifications.

The Court: Once the manufacturing process actually [fol. 587] begins from the blueprints, did he also have the responsibility of an engineer in connection with the matter, and if so, under what circumstances?

The Witness: In that technical area, as a last resort, as a person to go to for technical answers.

The Court: Well, let's assume this phrase last resort is correct, and let's assume there was a defect in a particular radiosonde discovered by somebody either in the company or working for the government. Under those circumstances, in your view, does the duty of Mr. Graul as chief of the engineering department embrace at least the possibility of his being consulted at that last stage?

The Witness: If the defect is technical, this is true. If it is workmanship or something of that nature, it is not under his jurisdiction.

The Court: So there is no stage of the process at which

he may not be consulted, but the kind of consultation relates to engineering; is that it?

The Witness: That is true.

Cross examination.

By Mr. St. Clair:

Q. Mr. Fisher, you had a superior as well, did you not?

A. I did.

Q. What was his name?

A. Mr. John R. Johnson.

[fol. 588] Q. And where was his office located?

A. His office was located in Melrose Park, Illinois.

Q. What office or position did he hold in the defendant Standard Coil Products Company, Inc., if you know?

A. He was vice-president.

The Court: Was there only one vice-president in Standard Coil?

The Witness: No, he was vice-president in charge of the North Dighton operation and sales.

Q. What did his duties consist of, as far as you know, as vice-president in charge of North Dighton operation and sales?

A. His duties as vice-president with respect to North Dighton was to establish sales quota prices—I am talking primarily of the commercial activity, because prices were fixed in the military because they were contracts. Discussions of overall company policies. Labor relations, and all the facets of general operation.

Q. With respect to the manufacture of radiosondes, what duties if any did he have, as far as you know?

A. As far as I know, none.

Q. You reported to him, did you?

A. I did.

Q. In so far as you had duties with respect to the production of radiosondes, did you report to him?

A. Yes, I did.

[fol. 589] Q. And on occasion did you report orally?

A. And used the telephone quite a lot.

[fol. 590] Q. On occasion did you report in writing?

A. Yes, we did.

Q. Now to your knowledge did Mr. Johnson have a superior?

A. Mr. Johnson's superior was Mr. James A. Burke.

The Court: I'm sorry?

Mr. St. Clair: Mr. James A. Burke.

Q. B-u-r-k-e?

A. B-u-r-k-e.

Q. What office did Mr. Burke hold?

A. Mr. Burke was President of Standard Coil Products.

Q. May I ask, sir, if that was true at all times during the period October, 1956 through November, 1957, if you know?

A. Well, I'm not sure again because there was a change. I don't know the exact date of the change. I would rather not say.

Q. At some time at least during this period Mr. James A. Burke was the president?

A. That is true.

Q. Prior to that time what office did he hold, if any, if you know?

A. Mr. Burke was vice president in charge of Finance, I believe.

Q. Who served as President during the period Mr. Burke was Vice President in charge of Finance, if you know?

A. Mr. Glen Swanson.

[fol. 591] Q. Can you help us at all as to the year Mr. Swanson's position as president was given to Mr. Burke?

A. I believe it was the year 1956. I am not sure which month.

The Court: Is this before the contract?

Q. Could it have been prior to October of 1956?

A. It could have been.

Q. What is your best memory with respect to when it was?

A. I'm really not sure.

The Court: Isn't this a matter about which there can be really no dispute? Does the Government suggest Glen

Swanson was President of the corporation at any of the relevant times?

Mr. Caner: No, I don't consider it relevant at all.

The Court: I didn't ask you that. I merely asked whether at any of the relevant times Glen Swanson was President.

Mr. Caner: Not to my knowledge. I don't know.

Q. When Mr. Burke became President was he responsible to some other officer of the company?

The Court: Was there a Chairman of the Board?

The Witness: I don't believe there was a Chairman of the Board. He's responsible to the stockholders.

The Court: No. Was there a Chairman of the Board?

[fol. 592] The Witness: I don't believe so.

Q. Did Mr. Swanson become Chairman of the Board when Mr. Burke became President? Does that refresh your recollection?

A. I'm not sure of this at all.

The Court: The jury is to disregard what the witness said about the relationship between the Chairman of the Board and the President. That depends upon the particular statutes of the State of incorporation and the particular by-laws of the corporation, which may under certain circumstances give the Chairman of the Board authority over the President and under other circumstances not give him such authority. I have not ruled upon that matter. The witness' testimony on this point is to be disregarded.

Q. Then in addition to the officers we have mentioned, there was of course a Board of Directors, was there not?

A. Yes, there was.

Mr. Caner: I fail to see the relevance of this line.

The Court: I do not see it myself. Are we coming to something relevant, Mr. St. Clair?

Mr. St. Clair: No, except—

The Court: Then let us not go in that direction.

Mr. St. Clair: I was going to add an exception.

The Court: All right.

[fol. 593] Mr. St. Clair: If we are going to talk about the corporate hierarchy we ought to have the entire hierarchy.

The Court: Oh, no.

Q. Well, now you have mentioned the fact there was a Servotronics Division under your supervision as General Manager at North Dighton?

A. Yes.

Q. In addition, there was a Tuner Division located in North Dighton, is that correct?

A. That is correct.

Q. The Tuner Division, as I understand it, manufactured a commercial product as distinguished from a Government product, being a tuner for TV sets?

A. That is correct.

The Court: We are not concerned with that, are we?

Mr. St. Clair: Except in one small particular, your Honor.

Q. Is that correct?

A. That is correct.

Q. Under normal production at North Dighton what percentage would you say of the production at the plant was devoted to the Tuner Division, on the one hand, and the Radiosondes on the other?

[fol. 594] (Mr. Caner rises.)

The Court: Well, I will allow this question, but I am not going to allow a general exploration.

Mr. St. Clair: That is the only question I was going to ask him.

The Court: What was the percentage? How are you measuring—by instruments or dollars or how?

Mr. St. Clair: Let us say in dollars, in the normal and usual course of business in dollars.

The Court: Percentage of value of gross output?

Mr. St. Clair: That is good.

Q. If you can tell us?

A. The Tuner Division ran approximately 80 per cent of the total sales dollar and radiosondes were about 10 per cent.

[fol. 595] Q. And the other items such as camera controls and so forth, the balance?

A. The balance.

Q. Now in the course of—

Mr. St. Clair: May I have just a moment?

(A short pause.)

Q. I take it Mr. Knupp reported directly to Mr. Gramm, is that right?

A. At what time?

Q. During October 1956 and thereafter to November of 1957.

A. During October of 1956 I think he reported to Mr. Murphy.

Q. Mr. Murphy. And Mr. Murphy in turn reported to Mr. Gramm and Mr. Gramm reported to you?

A. This is true.

Q. At some time later, at least by the middle of 1957 a change was made?

A. This is right.

Q. Mr. Knupp reported to Mr. Gramm?

A. True.

Q. Mr. Gramm in turn reported to you?

A. Correct.

Q. Now I think I have only one or two more questions, if I may. You have mentioned that you thought Mr. Knupp was in charge of tests for the Production Department, as I understand it; is that correct, at one time?

[fol. 596] A. That is right.

Q. By that do you mean the company's calibration of units prior to submission to the government for the government's test?

A. That is what I meant.

Q. That is, Mr. Knupp was never in charge of the government test as such?

A. No.

Q. You know Mr. Palliotto, do you?

A. I have met Mr. Palliotto.

Q. In the course of your duties did you meet him at the plant in North Dighton?

A. I met him at the plant in North Dighton.

Q. Did you on occasions have discussions with him?

A. On occasions, we said Good Morning. I don't remember very many discussions of any kind.

Q. Was there any reason why if he wanted to talk to you he could not?

A. My door was always open.

Mr. St. Clair: Thank you, that is all.

Mr. Angoff: No questions.

Redirect examination.

By Mr. Caner:

Q. Of the items manufactured for the government, Mr. Fisher, what percentage was the radiosondes in comparison to the other items in terms of gross sales?

[fol. 597] A. About half.

Q. I am not sure that you have told us who Mr. Murphy was. Who was he?

A. Mr. Murphy was a production supervisor who worked for Mr. Gramm and at one time was assigned to the radiosonde lines.

Q. That was during the first half—

A. This is true.

Q. Later he was transferred to the Tuner Division?

A. I believe so, yes.

Q. After that Mr. Knupp reported directly to Gramm?

A. Yes.

Mr. Caner: That is all.

The Court: You are excused. Your next witness.

Mr. St. Clair: May we approach the bench, if your Honor please?

(Conference at the bench as follows:

Mr. St. Clair: By way of what may be needless anticipation, as a result of your Honor's ruling the other day that a privilege exists between counsel for the United States and the employees of the United States with respect to the preparation of the case, I would suggest that the United States Attorney be instructed not to inquire into the production, into the preparation made by counsel for the com-

[fol. 598] pany, by way of statements and so forth, be-

cause of the assertion of the same privilege. I would not like to have to claim the privilege in front of the Jury if I were to do so—

The Court: If you mean something was submitted to you as counsel.

Mr. St. Clair: Not to me.

The Court: Or submitted to a superior pursuant to your suggestion, it should be prepared for you, and comes within the attorney-client privilege, you want to know exactly how I interpret the attorney-client privilege? I have said all I want to say in writing or print in United States v. United Shoe.

Mr. St. Clair: Which I have read. I don't have myself in mind. General counsel for the company is who I am talking about and members of his office, who are lawyers.

The Court: I decline to give anticipatory rulings and declaratory judgments.

Mr. St. Clair: All I can do is raise the question.)

[fol. 599] ROBERT ROSENHOLM, Recalled

Direct examination.

By Mr. Caner:

Q. What is your name?
A. My name is Robert Rosenholm.
Q. What is your address?
A. 63 Providence Avenue, Riverside, Rhode Island.

The Court: Rhode Island?
The Witness: Yes.

Q. What is your present occupation?
A. I am a foreman at Raytheon Test Department.
Q. Doing what?
A. I am an acting foreman at Raytheon in the Test Department.

The Court: Let me tell you, you are not a defendant. Be of good courage and speak up.

The Witness: I was going to. I work at Raytheon, and my occupation is, I am an acting foreman in the Test Department.

Q. Generally speaking, what do you test?

A. Radar systems, sonar systems, things of that nature.

Q. Were you ever employed by Standard Coil Products?

A. Yes, sir.

Q. When?

A. About September 1956, to about March 1958.

Q. Where?

[fol. 600] A. The plant was located on Spring Street, North Dighton.

Q. What were you employed doing, first of all?

A. My first job was in the Quality Control Department as a final inspector, what they call—

The Court: What?

The Witness: I am trying to think of the title, it was some sort of final inspector.

Q. Final inspector of what, radiosondes?

A. In order to answer that question, when the production units came off the line, and they had gone through their calibrations, the final check was to see if they agreed with the ambient temperature, pressure and humidity. That was my job, to see if they did that.

Q. Was that called an operational test?

A. Yes, sir, that was the name.

Q. Referring to this chart, Government's Exhibit 4, which you can see—

The Court: He has never seen it before. Step down and look at it. A copy of it will be given to you if you need it, in front of you on the witness stand. Take a moment to look at it.

You will recognize it as a chart of the second floor of the North Dighton plant. You will recognize stations which have numbers there which are supposed to correspond with the way conditions on the second floor were in 1956 and [fol. 601] 1957. Other witnesses have already covered the general description.

Q. Now, Mr. Rosenholm, could you take the pointer and show us where you were positioned initially as a tester?

A. Right here, that was my first job.

The Court: You will have to tell us each time. We have had trouble with the chart.

The Witness: Position 8, final operations station.

Q. That is where you were?

A. Yes.

Q. What did you do? You can resume the stand, if you like. What did you do at that station, generally speaking?

The Court: This is the beginning of his service?

Mr. Caner: Yes.

The Witness: Yes. When the units came off the production line and had gone through the three calibrations, they would go to the operational test where I would check them for the ambient temperature, pressure and humidity and see that the motor read within the required speed which I believe was 5 to 13 revolutions per minute.

Q. Did you check all units?

A. Yes, sir.

Q. Not just government samples?

A. No, sir. These were units off the production line.

Q. Did you have any prior electrical training at that time?

A. Within the plant or outside the plant?

[fol. 602] Q. When you came to the job?

A. Yes.

The Court: How much education did you have as of that date? Had you gone to high school?

The Witness: Yes, sir.

The Court: What high school?

The Witness: East Providence High School.

The Court: Did you go to college?

The Witness: No, sir.

The Court: Technical school?

The Witness: Air Force.

The Court: What work did you do?

The Witness: I was a radar technician in the Air Force. I went to Lowry Air Field for electronic fundamentals and the system I worked on which was a fire control system.

The Court: Did you have any other training?

The Witness: No, sir.

The Court: Did they give you any training at Standard Coil when you arrived?

The Witness: Not on the first stage. This first stage they just taught me, yes, they taught me how to read code.

The Court: Instead of that, I am going to ask you—

The Witness: Bob.

The Court: —to tell us who?

The Witness: Bob taught me how to read code.

[fol. 603] The Court: By that you mean the Morse Code?

The Witness: Yes, sir.

The Court: In what sense did he teach you?

The Witness: We had classes.

The Court: You used a key and you sound signals, dot, dash, until you were able to pick it up at what rate per minute?

The Witness: I am not sure of the rate.

The Court: Pick it up at the rate which was common on the radiosondes?

The Witness: Yes.

The Court: A little faster perhaps?

The Witness: Well, at first I was pretty slow.

The Court: What else did he teach you?

The Witness: Then he taught me how to work this operational station, final operational station.

The Court: That is a lot of abstract words. What did he teach you?

The Witness: My job.

The Court: That is even more abstract.

The Witness: How to plug in the unit on the station.

The Court: He taught you to put a plug in a switch.

The Witness: Yes, sir, to learn how many revolutions per minute the motor was going, how to arrive at the ambient humidity by using wet bulb and dry bulb thermometers.

[fol. 604] The Court: You will have to tell us exactly the process.

The Witness: We will start from scratch.

The Court: That is right.

The Witness: First you plug in the unit which would send in about 6 volts and the motor would turn.

The Court: You can illustrate it here.

The Witness: I think I can explain it.

The Court: You might illustrate it. The Jury will follow it better, perhaps.

Each time you do something, use a word, don't use a gesture, remember what you are saying is being taken down by the court reporter and will ultimately be read by an appellate court which might not have the instrument in front of it.

You have picked up what is in this case Exhibit 1, radiosonde.

The Witness: A radiosonde unit. It has two plugs on it. One plug supplies the voltage for the little motor in here. Your other plug supplies the voltage for the transmitter. If you plug them in the motor then turns.

When the motor turns the gear train turns, which turns the record on the other side which is attached to it.

Right on the record are three pickup arms just like on a phonograph. One is for pressure, one is for temperature, one is for humidity.

[fol. 605] Attached to the pickup arms is the hair elements for the humidity. As the hair shrinks or expands it moves the position of the pickup arm on the record, sending out a different code.

As the temperature expands or contracts the temperature element that moves the temperature pickup arm, changing the code. As the pressure expands or contracts that changes the position of the pressure pickup arm on the record.

What happens, at each station on the line they get an exact temperature and then they set the temperature pickup arm for an exact code. Then they go to pressure, to get an exact pressure, say 990 millibars. They set the pressure pickup arm for a code which I remember was WB.

They do this also to the humidity, get an exact humidity and set the pickup arm on the record for the exact humidity. When these things are done, as the temperature, humidity and pressure changes back and forth, the position of the arms changes back and forth and follow a chart. The chart is derived off the information given, as it went through its calibrations in production, as the unit started the process until it finished.

Charts were made of the pressure, temperature, humidity. As these things go, the pickup is supposed to follow, to go along with the chart derived for it. My job was to plug [fol. 606] the unit in, listen to the general temperature, pressure, humidity.

We will say in this run here right now, it should be in this room a certain set code for these three things. My job was to plug it in, listen to the code. There was a certain tolerance we were allowed to go by, to see if it came within the tolerances, to see if the code sounded correctly, the transmitter was working properly, and the motor ran in the required range, 5 to 13 revolutions per minute.

If the unit did all these things, I put it on the storage rack, listed on the chart there.

Q. Position 8?

A. 6, the storage rack.

[fol. 607] Q. Who assigned you to this position at the final operational station, No. 8?

A. Mr. Foo.

Q. He was in the Quality Control Department?

A. Yes, sir.

Q. Who was your immediate supervisor?

A. Al Sawyer.

Q. And above him was Fong Foo?

A. Yes, sir.

Q. Did you ever participate in the running of the Government Pressure Test?

A. Yes, sir.

Q. Will you tell us generally speaking how you ran the Government Pressure Test?

A. Well, units were placed in the Ambient Cold Pressure Station, Position 12 on the big chart.

Q. Yes?

A. The lids were closed and the temperature of the box was brought down to minus 50 degrees. Then the pressure in the box was lowered down to, I think, it was 147 millibars.

Q. Excuse me for a moment. You are referring to what was known as the Cold Run, are you not?

A. This is the Pressure Test I am speaking of.

Q. There were two tests: 1, a cold temperature, and one at a warmer temperature?

[fol. 608] A. I believe you are right.

Q. Now with respect to the run at the cold temperature, you may proceed.

A. With respect to the cold temperature, when the box was brought down to minus 50 degrees—minus 50 and the pressure you brought down to 147 millibars, I believe it was, we would then throw on the tape.

Q. Why did you start at 147 millibars?

A. They had about ten points on the whole range, where we took three millibars before, let us say 150—we took from 147 to 150 to 153—so that we had about six millibars either side of the 150 point—three millibars either side of the 150 point.

Q. When you say you took these points from 147 to 153 what do you mean?

A. Well, what I mean is that when we put the units in the box and plugged them in, the units automatically started running and sending out code. Then when the box was brought down to minus 50 degrees and the pressure was lowered to about 147 millibars we threw on the tape. This automatically put the code on paper for all the units that were in the box.

Q. So that the tape would record the signals from 147 to 153?

A. Yes, of all the units that were in the box.

Q. And at a higher point it would record the signals, say, [fol. 609] from 247 to 253, right?

Mr. St. Clair: If your Honor please, this could be rather important. I think the witness—

The Court: The objection is to the leading of the witness. The witness seems to be able to explain in his own language.

Q. All right. Going back to the example you earlier put: 147 to 153, was anything put on the tape besides the signals that were returned between those points?

A. Yes.

Q. What?

A. At each of the, well, we will say at 147, 148, 149, each

of these points were marked with a signal (sic) dash. As you read the barometer with the pressure changing you had a little switch there and when it would hit each of these points you would put a single dash. When it hit the 150 point you would put two dashes to indicate that was 150, and 151 would be one and 152 would be two and 153 would be, you know, a single dash. The only place—at 150 you would have a double dash to indicate that was the even number you might call it.

Q. At any point were numbers put to indicate the level at which the signals were being recorded?

A. I don't understand.

Q. Was any mark put on the tape to show whether the [fol. 610] recording was at the 150 level or 250 level?

A. Yes. That is what I just stated.

Q. You stated, did you not, that the dashes were put on?

A. That indicates the level.

Q. Two double dashes—150. How would you know it was 150 instead of, say, 250?

A. The man who was reading the tape would mark 150 at the 150 group and 350 on the tape in pencil when he reached the 350 group to indicate which level. Yes, that was written in pencil.

Q. Who wrote it?

A. Whoever was reading the tape. Do you want specific people?

Q. Yes, if you can.

A. Jim Pemberton, I believe, George Faria. There were several people. Bob Knupp read them, I believe. I have read them too. There were so many people it's just—well, the most common people were Jim Pemberton, who was the Quality Control Inspector at that Station.

The Court: Is that spelled P-e-m-b-l-e-t-o-n?

The Witness: P-e-m-b-e-r-t-o-n.

The Court: I know nothing about it except what is in front of me. Do you say that it is P-e-m-b-l-e-t-o-n?

Mr. Caner: No, your Honor, P-e-m-b-e-r-t-o-n.

[fol. 611] The Court: I invite you to look at another error on the chart.

Q. Did you in the course of running the Government

Pressure Test and in October of 1956 did you have a discussion with Knupp concerning the running of the test?

A. Yes, sir.

Q. What discussion did you have?

Mr. St. Clair: I object on behalf of the defendant Standard.

The Court: It is inadmissible in behalf of anybody except Knupp at this stage. I so instruct the jury. I do not know what the conversation is going to be about. It does not appear he has any authority in general to speak for the corporation on the particular matter. I have not yet been apprised as to whether he had adequate authority.

Q. What were you doing—before I reach that question—what were you doing at the time this discussion occurred?

A. I was reading the barometer on the Pressure, the Ambient Cold Pressure Chamber Test, Position 12.

Q. What happened?

Mr. Angoff: If your Honor please, it seems to me that at this time it would be wise to get in the date he first went to work for the Standard Coil Company because we are now operating in an area between the day he first came to work and October.

[fol. 612] The Court: You went to work in September of 1956, is that right?

The Witness: Some place around there.

The Court: Do you want anything more particular than that, Mr. Angoff?

Mr. Angoff: I have something in mind in this connection.

The Court: Can you tell us the exact date in September?

The Witness: No, sir.

The Court: Was it around Labor Day or was it later in the month?

The Witness: I am not sure.

The Court: Reflect for a moment.

The Witness: I tried. I got out of the Service in May, I believe, and I didn't work for three months. I started some place around September.

The Court: Was it an important date when you went to work?

The Witness: No.

The Court: It wasn't?

The Witness: It was to a certain extent. It wasn't important enough for me to remember the date.

The Court: Are you married?

The Witness: Yes, sir.

[fol. 613] The Court: Did you go away for a holiday on Labor Day of 1956?

The Witness: I can't remember.

The Court: I think your wife would be more shocked than we.

The Witness: I can't even remember my wife's birthday or anniversary.

(Laughter.)

The Court: All right.

Q. Tell us what this conversation was that you had in October of 1956.

A. I was reading the—well, what it is, it's a glass tube that contains mercury, and in the background there is a ruler type thing which records how many millibars, and as you take the air out of the chamber the mercury goes up to 2, so what you do is you have the units running in the box, you have your hand on the marker for the different points, and you have a magnifying glass, and when the mercury, say, hits 150 you hit the marker twice. When it hits 151 you hit it single times to indicate on the tape the different levels. I was reading the barometer at that time.

Q. Did you then have a discussion with Knupp?

A. Yes. Mr. Knupp asked me—

Mr. St. Clair: Just a moment.

[fol. 614] The Court: Did you have a discussion?

The Witness: I had a discussion, yes.

Q. What was the discussion?

Mr. St. Clair: I object on behalf of Standard.

The Court: It is only admissible against the defendant Knupp. It is not admissible against Standard Coil or Fong Foo.

Q. What was the conversation?

The Court: What was the discussion? What did you say and what did he say?

The Witness: I was reading it, and at that time I worked for Mr. Foo in Quality Control—

Mr. Angoff: I object.

The Court: That is not responsive. Therefore, I will strike that. You are not to give us all the surrounding circumstances because if counsel believes that to be relevant they will draw that to my attention or yours. You are merely to tell us what was said, what you said and what Mr. Knupp said. Bear in mind of course that no one thinks, even if you were able to remember your wedding anniversary, that you would be able to remember the details of every conversation of two years ago. So that you can fairly summarize it. But if you do happen to remember the particular words, so much the better.

The Witness: All right. He asked me to punch the [fol. 615] markers either a millibar before or after the required point where the mercury was. Say the mercury, for example, was at 150. He wanted me to punch that as 149. I refused to do so. Of course he ordered me to. I told him I would not do it unless Mr. Foo, himself, came down and ordered me to do the test this way. So he went down and got Mr. Foo. Mr. Foo came down and told me to do as Bob Knupp told me to do.

The Court: This is admissible against Foo as well as against Knupp now.

Mr. St. Clair: If your Honor please, I would say it is not responsive. I don't raise the question, if your Honor please—

The Court: Whether it is responsive or not—now it is here.

Mr. St. Clair: I understand. But for the record I wouldn't want to appear to have been lax in my duties to my client. I do not object to the answer standing as long as it is clear on the record that it is not binding on the defendant Standard Coil. Otherwise, I think I should move to strike it as not responsive, because I did not anticipate this answer as being part of any question as to a con-

versation with Mr. Knupp. I believe I have protected my client's position.

The Court: It now appears that it is admissible against [fol. 616] both defendants individually.

Mr. St. Clair: Correct.

The Court: It is not Professor St. Clair running the law school.

Mr. St. Clair: I'm sorry. I apologize.

The Court: That is quite all right. It is a habit one gets from teaching and it is wonderful.

(Laughter.)

But the statements are not admissible against the corporation because as yet there is no showing that on such matters either individual defendant was authorized to speak for the corporation.

Mr. St. Clair: Thank you very much, your Honor.

Q. Have you told us all the conversation which you had with Knupp and with Foo?

A. At that particular time?

Q. Yes.

A. Yes. Mr. Foo came down and told me to do as Bob Knupp told me to do.

The Court: Well, now the question does really arise in connection with that conversation as to whether Foo didn't have authority to direct a subordinate, like Rosenholm, to follow the directions of Knupp. Why didn't he? This has to do with Standard Coil Company only.

Mr. Angoff: I don't know.

[fol. 617] The Court: You are fortunately not in a position where you have to say anything.

Mr. Angoff: I know.

The Court: Mr. St. Clair, is there any way out of this?

Mr. St. Clair: Pardon me? I am sorry?

The Court: As I understand it, the testimony of Mr. Rosenholm, if believed by the jury, is to the effect that Mr. Foo instructed Mr. Rosenholm to do what Mr. Knupp told Mr. Rosenholm to do. Mr. Foo's authority on previous testimony was adequate to give instructions to a person third down the line to follow the commands of a person

second down the line. Therefore, it is admissible now against the corporation.

Mr. St. Clair: In so far as it constitutes an instruction to an inferior, I would be inclined to agree, so limited to that.

The Court: I so limit it.

Q. Thereafter, how did you operate the Pressure Test?

A. I operated it as I was instructed by Mr. Knupp to operate the test.

Q. Do you remember which pressure point was involved in this conversation with Knupp?

A. No, sir. Normally if—

Mr. St. Clair: I think that is enough. The answer is [fol. 618] No.

Q. In operating the test thereafter, how did you know at what point to start the recording?

The Court: He didn't know any more than he knew before, did he? He may have been told to do something different, but he didn't know any more, did he, after he talked with Mr. Knupp?

The Witness: Know any more what?

The Court: How to start the test. That was your question?

Mr. Caner: Let me withdraw the question, if the Court please.

Q. After the conversation with Knupp, at what point would you start the Government Pressure Test?

A. On that particular test, and I would have to go into detail to explain why—

The Court: No, you don't yet. You may have to later. At what point did you start?

The Witness: At 146 or 148, one or the other, I can't remember just which.

The Court: You mean it was always one, but your memory does not tell you which one?

The Witness: In order to answer your question I would have to explain why.

The Court: Why you don't remember?

[fol. 619] The Witness: Why it had to be one way or the other.

The Court: I didn't ask you, and if counsel want to ask you that is up to him. As I understand you, you are sure you started it at either 146 or 148. You always started it at one of them, but you don't now remember which of them. Is that right?

The Witness: No.

The Court: Then tell us.

The Witness: 147 was the place where you were supposed to start the test. In certain cases, depending on how the units were running, they might shift up or down. You might start it at 146 or at 148.

The Court: One above or below the proper point depending upon the circumstances of the particular radiosonde. Is that it?

The Witness: Yes.

Q. You started at either in order to do what?

Mr. St. Clair: I think that—

The Court: If he had a purpose, he may testify what his purpose was, especially in view of the instructions.

Mr. St. Clair: What his purpose was, and not surmise as to what somebody else's purpose would be.

The Court: What was your purpose in starting it at 146 or 148 instead of 147?

[fol. 620] The Witness: To bring it within specifications —the group of units, their codes, to bring their codes within what we considered passing.

Q. While you were running the Government Pressure Test thereafter who did you take your orders from?

A. Robert Knupp.

Q. Did you observe the operation of the Government tests in addition to the Pressure Test?

Mr. Angoff: This is not an objection, but he said "thereafter", and I don't know what time he refers to.

The Court: I suppose it was after the conversation.

Mr. Caner: Yes, your Honor.

Q. After the conversation you have related, did you observe the operation of the Temperature Test?

A. In what capacity?
Q. Well, in any capacity.
A. Well—

The Court: I observed one the other day. Did you observe it in the sense you saw somebody carrying it on?
The Witness: I was working there. Yes, I did observe.
The Court: The answer is Yes?
The Witness: Yes.

[fol. 621] Q. Perhaps to clear up a point, did there come a time when your duties changed?
A. Yes, sir.
Q. When did that occur?
A. Well—
Q. As best you can remember?
A. I would say about four or five months after I started working there, I transferred over to Production as a working supervisor.
Q. This would be in approximately January of 1957?
A. Some place around there.
Q. What were your duties after that change?
A. My duties were to see that the calibration, or, you might say, the production calibrators calibrated 200 units a day.
[fol. 622] Q. During that period did you observe the operation of the temperature test?

Mr. St. Clair: No, the calibration or the Government test?
Mr. Caner: The Government temperature test.
The Court: Did you observe the Government temperature test?
The Witness: Yes.

Q. Now, will you tell us what you observed as to how it was run?

The Court: Well, now, that is much too vague. I certainly think that here he will have to state whom he observed and when, and all the other—

Q. Who did you observe running the Government temperature test?

A. Viola Faria.

Q. And where did you see her run the test?

A. At the temperature control station. On the big map it is called the single head recorder.

The Court: What number?

The Witness: It has no number.

The Court: Excuse me. I'm sorry.

Q. She was sitting—

The Court: It is underneath 3 and 11, right; is that where you mean?

[fol. 623] The Witness: No, sir, I don't see 3 and 11 here—I see 3, yes, it is under 3.

The Court: It is under 3 and under 11, isn't it?

The Witness: That is right, it is.

Q. And was she on the right or left?

A. The right-hand side.

The Court: Where it says single head recorder?

The Witness: Yes, sir.

The Court: Was she sitting where that hat is, or whatever it is?

The Witness: Yes, just about that.

Q. And did you observe her run the Government test for temperature?

A. Yes, sir.

Q. Now, will you tell us what you observed her doing in the running of the Government test?

Mr. Angoff: I object, your Honor.

The Court: I think that is quite right. When you are performing an operation, you cannot be observed by anybody else except your physical motions. What is going on in your mind are all matters not observable by the six senses, but by utilization of common sense and inference, which are for the jury.

Mr. Caner: Withdrawn.

Q. While Viola Faria was sitting at the temperature [fol. 624] control station mentioned, and while the Govern-

ment temperature test was being conducted, will you tell us what you observed her doing?

Mr. Angoff: Objection.

The Court: The objection is sustained. How does he know a Government test is being conducted. That is again including the very quality in the legal sense which cannot be observed by somebody else.

Somebody who walks into this court room can see that I am talking, seated on a chair, wearing a black robe, behind a bench, and he infers from that that I am exercising the function of a Judge. But he doesn't know I am a Judge. I might not have a commission at all. I may be a plain imposter.

Q. You observed Viola Faria sitting at the point indicated from time to time, did you not?

A. Yes, sir.

Q. Now, will you tell us what you observed her doing?

Mr. St. Clair: May I have the time, please?

The Court: When did you observe her? What month?

The Witness: Oh, some place between, I would say, about November of 1956.

The Court: You saw her then?

The Witness: Some place around that time, yes.

[fol. 625] The Court: Did you see her on several occasions, or on one occasion?

The Witness: Several.

The Court: Can you tell us how frequently? Every day for a month? Every day for a week?

The Witness: Just about every day of the week she was there at that station.

The Court: And you made observations during one week, or many weeks, of her?

The Witness: Many weeks.

The Court: Now, what is your objection?

Mr. Angoff: Just one preliminary. I would like to know against which defendant, because I represent two defendants, these questions are directed?

The Court: As I understand it, it is indiscriminately offered against all, and you are not being discriminated against.

Q. Now, will you tell us, please, what you observed her doing?

A. I observed Viola Faria running a test, a temperature test.

Q. And did you observe how she ran the test?

A. Yes.

Q. Will you tell us how she ran the test?

Mr. Angoff: I object.

[fol. 626] The Court: Well, that means not whether she ran it well or poorly, but what did you see her doing?

The Witness: Mechanically, how she was working?

The Court: Yes.

The Witness: She would take—the samples varied at times. I believe there were four temperature samples taken out of a group of 200 units and used as the temperature samples. I could be wrong; it could have varied from time to time, and it could be six. But anyway, she took the four and placed them in the temperature test chamber, which is No. 11 of your big map.

She plugged the units in, and of course this caused the units to start running again and send off code. Then she lowered the temperature of the box down to, I believe, minus 50.

The Court: Did you see that? Did you see the minus 50?

The Witness: Yes, on the meter.

The Court: You can see that I am writing at the moment. Have you any idea whether I am writing capitals or small letters?

The Witness: No.

The Court: You must be very near to tell?

The Witness: Yes.

The Court: Were you near enough to be able to tell that [fol. 627] it was at minus 50?

The Witness: Yes.

The Court: You were standing in such a position that you could see her set the instrument for minus 50?

The Witness: Yes, on occasions.

Q. What further did you observe?

A. Well, she took about—she first went to minus 50, then she took the code at other points, I can't remember exactly what the points were.

The Court: You mean you saw her move something?

The Witness: I saw her flip the switches, which puts warm air into the code box. You might say it raised the temperature of the—

The Court: You saw her move the switches?

The Witness: Yes.

The Court: What else did you see her do?

The Witness: Well, I saw her do this to obtain different levels, temperature levels.

The Court: You can't tell us what she had in her mind. She might have been doing it just to amuse you.

The Witness: That is possible.

The Court: So please don't tell us what went on inside her mind, because you were not there. You can tell us what she did externally that you observed.

The Witness: I saw her throw switches.

[fol. 628] Q. What did you observe with respect to the temperature meter?

A. I saw the temperature meter change.

Q. From what to what?

A. Well, let's say to a different level.

The Court: No, not let's say—what did you see?

The Witness: A different level.

The Court: Up or down?

The Witness: Up.

The Court: Always?

The Witness: Yes—no, not always. In general, always; I mean there might be times she might go back to check the temperature on a lower temperature again. But most generally you raise a temperature after you are at minus 50 or if you are at minus 50.

Mr. St. Clair: I suggest this witness is testifying to many conclusions drawn as the result of these things.

The Court: No, he has been now telling us whether it was up or down. He can tell whether my pen goes up or down, and if he is near enough he can tell whether a barometer goes up or down. He has told us that he was standing in a position where he could see. Up to now I don't know any reason not to believe him on his oath.

[fol. 629] Q. Did you see the meter in the vicinity of minus 50 degrees Centigrade?

A. Yes.

Q. And did you see it in the vicinity of other points?

A. Yes.

Q. What other points?

A. I can't remember what the points were.

Q. Now, with respect to instances where you saw the meter in the vicinity of minus 50 Centigrade, will you tell us what you observed her doing at that level?

A. Well, when she was down, at the temperature of—temperature of the test chamber down to about minus 50 degrees she had these buttons, I believe it was, that raised and lowered the temperature, and she had a meter which at the no point was minus 50 degrees, and I believe there was a switch in there that had minus 50 and different levels.

So when she had the switch pressed on minus 50 degrees and moved the meter and pressed the hot and cold buttons until it stabilized, then she had a switch which switched to one of the six positions in the chamber, to take the code off one of the six positions in the chamber. When she flipped the switch, then that particular unit started to send out code on the tape.

Q. Did you hear that code?

[fol. 630] A. You could hear the relay.

The Court: No. You didn't hear it?

The Witness: You could hear it.

The Court: Could you hear it?

The Witness: Yes, I could.

Q. What did she then do?

A. She would throw the switch which caused the tape to run. The tape which I am referring to is a piece of paper that had a code on it for that particular unit. And she would throw the switch, and the tape would come out with the code that was on that unit.

Q. Now, with respect to the minus 50 Centigrade level, did you ever see her take the code at a point other than the minus 50 degrees Centigrade?

A. No, I couldn't testify I actually seen her do it.

Q. Now, with respect to the shock test, did you observe how the shock test was operated?

A. Yes.

Q. Who did you observe running the shock test?

Mr. Angoff: As I read the indictment, there has been no allegation concerning either of the two defendants I represent with reference to the shock test as far as he was concerned. Nor did we get any specifications. This is my own memory. I don't think he ought to be permitted to roam all over the lot. We have got to know what we [fol. 631] are defending.

The Court: I of course don't have in mind every line of the indictment, nor do I have in mind every line of the specifications. Mr. Caner, I will give you a chance until 2:15 to look at the exact point to which you want to refer in the indictment or the specifications. And I will rule after I have examined it, not before.

[fol. 632]

AFTERNOON SESSION

Mr. Caner: A suggestion was made just before recess and the counts in the indictment relating to the shock test are Counts 4 and 8. Paragraph 9-C of the conspiracy count likewise relates to the shock test, and in all of these places all three defendants are charged with having falsified the shock test.

The Court: What have you to say to that?

Mr. Angoff: My objection goes to the particular witness on the stand. There is nothing in any particular that ties this witness up with the defendant.

The Court: You may proceed.

Q. You were asked before recess, I believe, Mr. Rosenholm, whether you observed the running of the shock test?

A. Yes.

Q. And when did you observe the running of the shock test?

A. Approximately around the same time that I stated

before I observed the temperature test. I believe it was around November of 1956, some place in that vicinity.

Q. And you testified, I believe, that you observed the pressure test run for a matter of weeks, did you not?

A. Yes.

Q. And did you see the shock test run for a matter of weeks?

A. Yes, during the time that I worked there they always [fol. 633] ran these tests, so they were going on all the time.

Q. And did you see who ran them, the shock test, that is?

A. Yes, I believe it wasn't always the same people.

Q. Can you tell us who the people were, as best you remember them, that were involved in running the shock test?

A. Al Jones at times ran the shock test, or rather I carried the units to the different points, he overseen the shock test.

Q. Who was Al Jones?

A. He was the quality control inspector, I guess you would call it.

Q. Who was he employed by?

A. Fong Foo.

Q. Was he employed by the corporation?

A. Yes.

Q. And his superior was Fong Foo; is that right?

A. Yes.

Q. Now, will you tell us what you observed as to the way the shock test was conducted?

Mr. Angoff: I object. He asked who the people were, and then he stopped at the first person.

The Court: All right, have you some others?

The Witness: I am not positive of any others.

The Court: Were there others whose names you don't remember?

The Witness: Yes.

[fol. 634] Q. Now, will you tell us what you observed as to the running of the shock test?

Mr. St. Clair: If your Honor please—

Mr. Angoff: I object.

The Court: What he observed, he may certainly testify to.

Mr. Angoff: In what connection to tie up the defendants?

The Court: I do not yet know.

Mr. St. Clair: I would be much happier if the simple question would be, what did you see done, because what did you observe may include more in this witness' mind.

The Court: Well, observe as used in the question means see, and he may answer the question. Or it also includes anything you heard in the sense of dots and dashes transmitted by the Morse Code.

The Witness: Are you asking me how the shock test was run?

The Court: No. What did you observe? What did you see happen?

The Witness: I seen them run the shock test.

The Court: That doesn't help us. You saw somebody lift something?

The Witness: I saw them lift units. Do you want me to give you the procedure?

[fol. 635] The Court: Whatever you saw.

The Witness: Mr. Palliotto, the government inspector, would pick out three samples—

Mr. St. Clair: Now, if your Honor please—

The Court: It is absolutely unnecessary to characterize anything by any descriptive words which have a legal significance. You saw Palliotto do something, but I don't know that he is the person about whom the inquiry was put?

Mr. Caner: The inquiry was a general one as to what he observed as to the running of the shock test.

The Court: Well, all right. If he wants to say that the person he observed was Mr. Palliotto, he can say no. But I assumed you meant to ask him about somebody other than Mr. Palliotto, hadn't you?

Mr. Caner: I had, but I think—

The Court: All right, then, let's find out. Did you see anybody who was an employee of the company do anything?

The Witness: Yes, sir.

The Court: Whom did you see do something?

The Witness: I saw Al Jones give all of these units—

The Court: Well, not give. What did he do?

The Witness: Hand these units?

The Court: All right. I don't suppose he gave them.

The Witness: He handed these units to the final operational station.

[fol. 636] The Court: Now, wait a minute. He handed them to somebody?

The Witness: He handed them to one of the girls who was running—

The Court: He handed them to a girl?

The Witness: Yes.

The Court: It is very simple; you are talking to a child, now.

The Witness: He handed them to a girl. This girl ran the pressure test at the final operation.

The Court: You couldn't tell whether it was final or not by watching?

The Witness: At the pressure calibration station he would hand these three units to the girl running the station.

The Court: What would she do?

The Witness: She would place the units in through the pressure chamber. Then she closed the pressure chamber.

The Court: Could you see what went on?

The Witness: I could see her close the door.

The Court: And that is all you could see?

The Witness: Yes.

The Court: As far as you know, she may have been singing in there, or dancing?

The Witness: Yes, sir.

The Court: All right.

[fol. 637] The Witness: Then the girl would lower the pressure of the chamber.

The Court: How do you know that? I just told you you wouldn't know whether she was singing or dancing, would you?

The Witness: No. I could see the girl throwing switches.

The Court: While she was in the chamber?

The Witness: No, she was not in the chamber. The units were.

The Court: All right.

The Witness: I saw her throw switches. And then I seen the mercury in the glass would be dropping.

The Court: You could see that from where you were?

The Witness: Yes, because it is right out in front of you.

The Court: There are a lot of things right out in front of me that I can't see.

The Witness: Well, I could observe it dropping.

The Court: You must have been very near. How near were you?

The Witness: About 4 feet.

The Court: And the barometer was 4 feet from you?

The Witness: Approximately.

The Court: Go ahead.

The Witness: The mercury would drop then—

[fol. 638] The Court: It wouldn't. It did?

The Witness: It did drop down, and she would throw switches.

The Court: You mean she did?

The Witness: Yes.

The Court: What she would do is one thing, but what she did is even more important.

The Witness: She threw switches, and a tape would come out with code on it.

The Court: A tape would come out?

The Witness: Did come out, with code on it. And she would record—

The Court: And she what?

The Witness: She did decode the code that was on the tape.

Q. And did she make a record of that decoding on anything?

A. She made it on the tape. She wrote down on the tape.

Q. What did you see her write?

The Court: Could you see what she wrote on the tape?

The Witness: No, sir.

Q. Well, did you see figures written on the tape?

Mr. Angoff: I object.

The Court: Could you tell whether they were figures or letters from where you were?

The Witness: Yes.

[fol. 639] Q. What were they?

A. What were the exact figures?

The Court: No. Which were they, letters or figures?

The Witness: Both.

Q. And after the tape was thus produced, what else if anything did you observe in connection with the running of the shock test?

A. She would do this at several points and she would take the units out of the chamber, and she would give these units to Al Jones.

The Court: She would?

The Witness: She did give these units to Al Jones, who then took these units and went up to the far end of the room where they have a table, and he would place—he did place units in his little box, and he would drop it—he did drop it.

Q. And are you speaking now of Position 15 on the chart?

A. Yes, sir.

Q. And at that point these units would drop?

A. Yes, sir.

Q. And what did you observe done after that?

A. He would take the units out of the box after he had dropped each one, and he handed those back to the girl who was running the pressure calibration station.

Q. And what was done after that?

[fol. 640] A. She placed the units into the chamber and repeated the original procedure and received the tape—decoded the tapes and then they were compared.

The Court: Now, you can't testify anything more. You saw her look at two tapes, first one and then the other?

The Witness: Yes.

The Court: This drew the inference that she compared them, and maybe the jury will draw the same one.

The Witness: I am sorry. She then handed the tapes to Al Jones.

Q. And did you observe what Al Jones did with the tapes?

A. No, sir.

Q. Now, was there any occasion on which you observed any different procedure followed than the one you have just told us about?

The Witness: I did observe at times the first tape, or the original run of the units before they were shocked, I observed two tapes being run before they were shocked.

Q. Who did you observe running the two tapes, if you remember?

A. I can't remember. The girl or the person running the pressure calibration station.

Q. And when you say there are two tapes, do you have reference to a particular station?

A. This is the shock test we are speaking of?

Q. Yes.

[fol. 641] A. The pressure calibration station.

Q. So you saw two tapes run at the pressure calibration station before the shock?

A. Yes, sir.

Q. And then did you see a tape run after the shock?

A. Yes, sir.

Q. Did you observe what was done with the two tapes before the shock?

A. No, I can't swear to that.

Q. Now, did you ever observe, Mr. Rosenholm, whether there were written instructions furnished to the operators of the calibration test?

Mr. Angoff: May I have that question read?

The Court: Did you ever observe whether there were instructions furnished to the operators of the calibration test? Yes or No.

The Witness: No.

Q. Did you ever see any written instructions furnished to the—?

Mr. Angoff: I object.

The Court: That is the same question put another way, an attempt to impeach the witness. The objection is sustained.

Mr. Caner: I just wanted to make it clear. I don't think it was a very good question, your Honor.

The Court: Well, it may not have been, I won't argue that. If you proceed to the next one, you will have another chance.

[fol. 642] Q. Did you ever see any written instructions to calibration test operators?

Mr. Angoff: I object. That is the same question.

The Court: Of course it is.

Q. Did you ever have any conversation with Robert Knupp concerning the way the tests were run in California?

The Court: Did you have any such conversation, Yes or No?

A. Yes.

Mr. Angoff: Your Honor, I object, it deals with California, sunny California.

The Court: I have no idea whether it has any bearing or not, at this stage. I will allow further questions on this subject.

Q. Do you recall when you had the conversation?

A. I don't recall the month.

The Court: Approximately the year and season?

The Witness: Beginning of 1958, I believe.

Mr. Caner: What?

The Court: With whom?

Q. With whom did you have the conversation?

A. Robert Knupp.

Q. What did he say to you?

The Court: Admitted only against Robert Knupp and not against any other defendant at this stage.

[fol. 643] Q. What was said in the conversation?

A. I asked him if he was going to see Joe Hesta.

The Court: Who?

The Witness: Joe Hesta, the FBI agent.

Mr. Angoff: I object, your Honor.

The Court: I have no reason to suppose this is not admissible. I take it it is going to lead to something which is regarded by you, Mr. Caner, as being in the nature of an admission of one defendant. Is that what it means?

Mr. Caner: It is an admission of—

The Court: One defendant.

Mr. Caner: —of the defendant Knupp. I suggest—

The Court: I will allow it. The jury may not believe the whole business.

Mr. Angoff: I wonder whether or not I was correct when I said that this conversation relates to something Knupp had done in California?

The Court: I have no idea.

Mr. Angoff: I thought he said that.

The Court: The conversation was in California, with respect to a practice in California.

Mr. Caner: That is right.

The Court: But the conversation with respect to a practice in California may have something to do with something else. I am not going to anticipate what I do not know about.

[fol. 644] Mr. Angoff: Pardon me, is Mr. Hesta in the court room this morning?

Mr. Caner: Let me run my own case.

The Court: That is a perfectly proper question, Mr. Caner. I think you must answer it, in view of my ruling.

Mr. Angoff: He was—

Mr. Caner: No, your Honor, he is not being called as a government witness.

Mr. Angoff: I didn't know.

The Court: There was no reason not to answer the inquiry promptly. By refusing to answer it makes one suppose something improper had been done.

Q. What was the discussion which you had?

A. I asked him, was he going to see Joe Hesta, who is the FBI agent who is investigating this case. He stated, No, he was not. So I stated, well, I felt that this could not have been all his idea, the way the tests were run. He stated the tests were always run this way.

The Court: His answer was what?

The Witness: The tests were always run this way, the way they were run at the North Dighton plant.

The Court: That is plainly inadmissible, the whole conversation. I instruct the jury you are to pay no attention to any of the testimony because it does not on its face constitute any admission of wrongdoing. It is hearsay, in-

[fol. 645] admissible and irrelevant.

Q. Have you completed?

The Court: I am sure he has. Haven't you completed it? Have you completed telling us about the conversation? I did not mean to interrupt you, I am sure.

The Witness: Do you want me to relate the entire conversation?

The Court: Yes.

The Witness: All right. I had asked Mr. Knupp at that time, the FBI was investigating the case, he knew I had spoken to the FBI.

Mr. Angoff: I object.

The Court: You can only tell us what you said. You might think you know what I know but you might be mistaken, I might know much less than you think I do.

The Witness: In either case I was trying to persuade Mr. Knupp to see the FBI.

The Court: Have you told us the whole conversation?

The Witness: No, sir.

The Court: Keep on.

The Witness: So I asked him what had happened here could not have been all his idea. He stated No, these tests had always been run this way. I stated, I would not like to see him get hurt. He stated, if he gets, let us say, convicted or hurt through this thing, a lot of people are going

[fol. 646] along with him, that at times, the other time there Mr. Fisher had told him when he was in trouble with these units, to fix those units. I asked Bob exactly how he meant it. Bob gave me the impression—

Mr. St. Clair: Well now—

The Court: What he said, he said something about Mr. Fisher?

The Witness: Mr. Fisher had told him to fix those units.

The Court: I don't understand the word "fix." It might be a proper word or an improper thing.

The Witness: It is a vague thing.

The Court: From the context of the conversation could you tell whether the word "fix" was used in the sense of repair or whether it was used in the sense of causing someone to do something fraudulent?

Mr. St. Clair: If your Honor please I don't think this witness should be called on to interpret his language.

The Court: How the word "fix" was used? It is quite plain, if you say to somebody, I will fix that traffic case, everybody knows you are not going to repair it.

Mr. St. Clair: All right.

The Court: Did he use the word "fix" in a context which gave it meaning?

The Witness: Yes.

[fol. 647] The Court: What meaning did it have, as you understood it?

The Witness: As I understood it, Bob told me that he had the impression that Mr. Fisher wanted them fixed, in other words, make them work.

The Court: Repaired?

The Witness: No, the opposite, fix the test.

The Court: Fix, in the sense of make crooked?

The Witness: Yes.

The Court: Or fraudulent.

The Witness: Fraudulent.

Mr. St. Clair: Well now, if your Honor please, he is interpreting what he thought Mr. Knupp thought Mr. Fisher thought.

The Court: He is trying to tell us the impression from the words used. I can say I know you are making objections, I could not cite what the objection was.

Mr. St. Clair: In the first place, I should state the objection. The answer contained considerable hearsay as to a conversation between Mr. Fisher, who was here this morning and Mr. Knupp, a defendant.

The Court: It is not offered to show the truth of the matter, it is offered to show the state of mind of Mr. Knupp, who might have been entirely misled. It is to

show what the frame of mind of Mr. Knupp was. It is admissible.

[fol. 648] Mr. St. Clair: May I ask that the jury be instructed this is not offered for the truth of the statements contained therein?

The Court: It isn't offered for the truth of the matter, whether Mr. Fisher is a dishonest man; it has nothing to do with that fix. It is offered to show, whether or not correctly, Mr. Knupp had, according to this witness, a statement to make which indicated to this witness Mr. Knupp had a guilty conscience with respect to this matter, based in part upon what Mr. Knupp said Mr. Fisher had told him. Of course Mr. Fisher may have said no such thing, we do not know.

Mr. Caner: I do not know whether it appears, but did you ask the defendant what he thought Fisher had meant by the use of the word fix?

Mr. Angoff: I object.

The Court: Did you ask him about it?

The Witness: Yes.

The Court: You asked him what he meant by the word fix?

The Witness: Yes.

The Court: What did he say?

The Witness: Like I say, Mr. Knupp told me in his words, I cannot remember the exact words, he meant to fix a test fraudulently, if that is the way you want to put it.

The Court: I don't want to put it any way, you have [fol. 649] to put it.

Q. Earlier this morning you testified concerning a conversation which you had with Knupp in regard to the conducting of the pressure tests. At some time after that conversation did you have another conversation with Mr. Knupp concerning Allen Sawyer?

A. Not with Mr. Knupp, sir; no, sir.

Q. Who was the conversation with?

A. Mr. Foo.

Q. Can you remember approximately when it took place?

A. About December of 1956.

Q. Where?

The Court: Is it earlier than the other conversation?

The Witness: No, it was after the other conversation.

The Court: Are you now prepared to say that the conversation with Mr. Knupp was before December 1956?

The Witness: Sir, which conversation are you speaking of?

The Court: You will remember the conversation as to which counsel had a wrangle.

The Witness: Was this over the pressure test we are speaking of now?

The Court: Just a moment, let's get it straight. You had a talk with Mr. Allen Sawyer in December 1956, correct? Didn't you say that?

[fol. 650] Mr. Caner: About.

The Witness: About Allen Sawyer.

The Court: About Allen Sawyer, in December 1956, correct?

The Witness: Yes.

The Court: At some time you had a talk with Mr. Knupp about one FBI agent named Joe Hesta. When was that conversation?

The Witness: That conversation was at the beginning of 1958.

The Court: So this is much earlier?

The Witness: Yes. These are approximate dates.

The Court: Taken out of chronological order. All right, as long as we understand it.

Q. But this conversation concerning Allen Sawyer came after the conversation which you had with Mr. Knupp concerning the points at which you would have the pressure test, is that right?

A. Yes, sir.

Q. Will you tell us where the conversation between you and Mr. Foo occurred, concerning Allen Sawyer?

A. I believe it was in his office, I am not positive, it could be on the floor or in his office.

Q. Will you tell us what was said?

The Court: Who was there, just Mr. Foo?

The Witness: Yes, Mr. Foo and myself.

[fol. 651] The Court: It is admitted only against Mr. Foo.

Q. Tell us what was said in the conversation, everything that was said from beginning to end.

A. I was instructed—

The Court: No. Somebody said something to you. Mr. Foo said something.

The Witness: Well, in order to put across—

The Court: No. You worry about the lawyers putting something across. You tell us what is the testimony in response to the question, what was said.

The Witness: I asked Mr. Foo—

The Court: You went in there on your own or did you come in response?

The Witness: No, I came in on my own.

The Court: You opened the conversation?

The Witness: Yes.

The Court: What did you say?

The Witness: I asked him was he sure he did not want me to relate to Al Sawyer how the tests were being run. Mr. Foo told me not to tell Mr. Sawyer how the tests were being run.

Q. Previous to that conversation, had you had a conversation with Robert Knupp?

A. Yes. He told me—

The Court: You are going backwards in the dizziest fashion, if I understand the chronological order, it is in [fol. 652] reverse.

Mr. Caner: That is right.

The Court: That is a very strange way to try a lawsuit. It is extremely difficult to follow. When was the conversation?

The Witness: About November. This conversation I just had with Mr. Foo was in about December 1956. Which conversation—

The Court: I do not know.

[fol. 653] Q. Had you just previous to that conversation you have just related had a conversation with Robert Knupp?

A. Yes.

Q. How much previous?

A. This conversation was the same conversation that I related earlier this morning.

The Court: We do not want you to incorporate by reference a whole transcript that none of us has clearly in mind. When was the conversation?

The Witness: In November, 1956.

The Court: In November of 1956 you had a conversation with whom?

The Witness: Bob Knupp.

The Court: Was anybody else present?

The Witness: Not that I know of.

The Court: It is admissible only against Knupp then.

The Witness: Bob Knupp told me not to tell Al Sawyer how the tests were being run.

Q. What did you reply to that, if anything?

A. I didn't tell Al Sawyer.

The Court: What did you reply?

The Witness: Yes, sir. That was my answer. Yes, sir.

The Court: That is all they want.

[fol. 654] Q. And it was as a result of that conversation you later had this conversation with Foo?

Mr. Angoff: I object.

The Court: That objection is sustained. "As a result" is something which really does not lie within the witness' power. If he went, because he was told, to see someone else, you can ask him, when he answered Yes, sir, if that led him to do something else. You cannot ask him with respect to the motivation, intent or subjective causation of other people.

Q. Why did you have the conversation, which you have related, with Foo concerning Al Sawyer?

The Court: Did he send for you or did you go to him?

The Witness: I went to him.

The Court: Why did you go to him?

The Witness: Why did I go to him? Because Al Sawyer actually, who was my boss at this particular time, kept questioning me on how the tests were being run, and I was instructed previously not to tell him how it was being run by Mr. Knupp. I went to Fong Foo to clarify the fact: did he want me not to tell Al Sawyer how the tests were being run?

Q. He told you what?

A. Do as Bob Knupp told me to do.

[fol. 655] The Court: Is there any reason to put the conversations in backwards? I haven't been able to follow them.

Mr. Caner: I have tried to put them in forward, your Honor.

The Court: It is quite clear the succession was as follows: in November of 1956 you went to Bob—no, Bob Knupp on your own, is that right?

The Witness: No.

The Court: He sent for you?

The Witness: Not Bob. It was not Knupp.

The Court: Am I right that you have testified since the noon recess with respect to a conversation at the beginning of 1958 when Mr. Knupp told you about the FBI agent Joe Hester?

The Witness: Yes.

The Court: You also testified in reverse chronological order about a conversation with Foo in December of 1956. Do you remember that?

The Witness: Yes.

The Court: You have also testified in reverse chronological order with respect to a third conversation, although it was only the second with Knupp, in November, in which the subject was Sawyer?

The Witness: Yes.

[fol. 656] You said it in just the reverse.

The Court: No. I now am running them back in chronological order to get the film going in the right direction.

The Witness: Yes, sir.

The Court: I run time forward and not backwards in my court. It is Forward and as Fast Forward as possible. The first conversation chronologically was November of 1956 with Knupp, is that right?

The Witness: Yes, sir.

The Court: Chronologically, the second one was with Foo, in December of 1956?

The Witness: Yes.

The Court: The third conversation was at the beginning of 1958 with Knupp?

The Witness: Yes, sir.

The Court: The first conversation—did you go to Knupp or did Knupp send for you?

The Witness: You are using Knupp again.

The Court: Well, would you take a piece of paper and pencil?

(The witness is handed a piece of paper and pencil.)

The Witness: Am I going to list them as you say them, as Conversation 1, Conversation 2?

The Court: Chronologically, which is the first one?

[fol. 657] The Witness: I don't understand what you mean.

The Court: I see. Chronologically means from the point of view of time. The sequence of time is such that 9:00 o'clock precedes 10:00 o'clock, and November precedes December.

The Witness: The first conversation was with Bob Knupp in November of 1956.

The Court: All right. Now we understand each other?

The Witness: Yes.

The Court: Who sent for whom?

The Witness: He instructed me—

The Court: No.

The Witness: He didn't send—

The Court: Did he come around and talk to you?

The Witness: Yes.

The Court: You were at your work and he came around?

The Witness: Yes. He told me—

The Court: All right. Now we understand that your misunderstanding was due to our not making clear the meaning of "chronological." Chronological means in time sequence.

Q. Did you ever have a conversation with Knupp concerning whether or not you were to tell Palliotto about [fol. 658] what was going on?

The Court: I would like to be sure. You must know all about this. Would you be good enough to take the conversations up in chronological order hereafter? Are we now taking the first one in order of time about Mr. Palliotto?

Mr. Caner: Yes, your Honor.

The Court: All right.

Q. Did you have any conversation with Palliotto on that subject?

A. With Knupp?

Q. With Knupp concerning calling Palliotto?

A. In November of 1956 I was told by Mr. Knupp—

The Court: No. Just answer Yes. In November of 1956?

The Witness: Yes, November, 1956.

The Court: Is this the same conversation which you previously labeled Conversation No. 1?

The Witness: Yes, sir.

The Court: So this is a further discussion on the occasion when Mr. Knupp stopped by your place where you were working and started to talk to you?

The Witness: Yes, sir.

The Court: All right.

Mr. St. Clair: I assume again, if your Honor please, this is limited only to the defendant Knupp?

[fol. 659] The Court: It is at this stage.

Q. What was said with respect to Palliotto in that conversation?

A. I was told by Mr. Knupp not to tell Mr. Palliotto what was going on concerning the test.

The Court: What did you say?

The Witness: Yes, sir. That was my answer.

Q. Did you follow that instruction?

A. Yes, sir.

Q. Did he ever tell you on any other occasion not to tell Palliotto how the tests were being run?

A. He could have but I don't remember.

The Court: Well, anybody could have. I could have told you but I didn't.

The Witness: I don't remember.

The Court: Don't say, "I could have." You can see how prejudicial that is to a defendant.

The Witness: Yes, sir.

Q. Now in the course of the testing of the Government samples it would occur from time to time, would it not, that defective—that defects were disclosed in the samples?

A. Yes, sir.

The Court: Will you be good enough to stay away from the passive before we get into trouble?

[fol. 660] Q. And did Palliotto on some occasions attempt to show the defects to Fong Foo?

Mr. Angoff: I object.

The Court: In your presence? Did he in your presence?

The Witness: I didn't get the question.

The Court: What is the objection?

Mr. Angoff: First of all, he is leading and dragging him by the nose. He is not letting him answer as to "what happened? What did you see? What did you hear?"

The Court: I overrule the objection.

Mr. Caner: Would you read the question?

The Court: The substance of it is did Foo in your presence make any comment about Palliotto?

Mr. Angoff: Your Honor—did he attempt—that is another objectionable matter.

The Court: I wanted to get away from that. Did Foo make any comment upon Palliotto in your presence?

The Witness: I will say No.

Q. Did it happen that you would observe Palliotto going to fetch Fong Foo to show him a defect?

The Court: Now wait a minute. Can you tell me how you observe somebody going to fetch somebody else with respect to a defect? There are three inferences in that statement.

[fol. 661] Q. It happened, did it not, from time to time that defects would be disclosed?

The Court: I asked you not to use the passive.

Q. Did you observe that defects—did you observe the disclosure of defects in the course of Government testing?

The Court: That is the same. Did you see a defect? Did you?

The Witness: Well, let me think about it. I had seen things that indicated a unit was defective.

The Court: All right. What did you see more particularly?

The Witness: Code on a piece of paper that did not correspond to the chart that is made for it.

The Court: I understand that. But I think the witness has given an answer which is a little condensed. If I understand you correctly, you saw upon tape dots and dashes, which would be in the Morse Code, and by looking at that Morse Code you knew that those particular letters did not correspond with the letters and dots and dashes which would have been recorded if the signals had been signals of an instrument in good working order, performing in accordance with the chart, is that right?

The Witness: Yes, sir, right.

Q. Did you see Palliotto do anything after the disclosure?

The Court: After the disclosure? You cannot shortcut [fol. 662] at these critical points. You have got to pin the responsibility upon some particular person. So far all we know is that the witness saw a record of dots and dashes which did not conform to the dots and dashes which were shown on the chart. That is all we know.

Mr. Caner: That is right, your Honor.

The Court: All right. You have been talking about disclosure. I don't know whether Palliotto knew about any-

thing. You may know as little as I do, and that is very little.

Q. Did you observe the indications, when these defects came to Palliotto's attention?

The Court: Just a minute. Did you observe Palliotto looking at this tape? That is the defect—?

The Witness: Yes. I observed Mr. Palliotto looking at a piece of paper that had code on it.

Q. And did you observe him do anything after looking at the tape?

A. Sir, is this one particular incident or—?

The Court: You put your mind on one incident, the most glaring one you can think of, and then you will be asked whether there were others.

The Witness: Yes.

[fol. 663] Q. And what did you observe him do?

A. Reject the lot.

The Court: Reject the lot?

The Witness: Yes.

Q. Now, did you ever see Palliotto go, on an occasion which he had observed the tape, and on an occasion where you had observed a defect, did you ever see Palliotto—

The Court: Will you please not say "observe a defect"? He never saw a defect in the sense somebody had one sleeve cut off of a gown and was obviously walking around with a one-armed coat. All he had observed was a tape. Do not use abstractions which will merely mislead the Jury and the Court, perhaps. He observed tape.

Q. After Palliotto had observed the tape did you observe him go anywhere?

A. Yes.

Q. And did you observe—

The Court: What did you see him do? Let's find out what he saw him do? What did you see him do?

The Witness: Maybe went out and got a drink of water or gone to his office.

The Court: That's what I thought.

Q. On some occasions did you observe—

The Court: The witness really isn't a Harvard graduate and uses "chronology" and "observe" and other 50-[fol. 664] cent words. "See" or "think" or words of one syllable. Please do that and you will get better testimony.

Q. Did you see Palliotto return with Fong Foo on certain occasions?

A. Yes.

Q. And what did you see Palliotto and Fong Foo do on those occasions?

A. On occasion Mr. Palliotto would show the unit to Mr. Foo.

Q. Now, did you see occasions in which units were adjusted between the time that Palliotto had looked at the tape and the time that Fong Foo came and looked at the tape?

(Mr. Angoff rises.)

The Court: Objection sustained on the ground it is passive. Objection sustained on many other grounds. Will you please put questions which conform to the simple and direct nature of the testimony which is appropriate at this very critical stage in the trial? All we know is Palliotto went to Foo. Foo then came with Palliotto. What did you see happen next?

Mr. St. Clair: If your Honor please, I thought Palliotto went to get a drink of water?

The Court: He did both things. He may have done a third thing.

Q. In the interval when Palliotto was away what did you see done with the units?

[fol. 665] The Court: Not done with the units. Will you please stay away from the passive? It is most important to know who does everything. Did you see anybody handle the units?

Q. Do you remember who you saw handle the units?

A. Several people.

The Court: Do you remember the name of any one?
The Witness: I saw Mr. Knupp handle a unit.

Q. What did you see him do with the units?

Mr. Angoff: Pardon me, can you give all the names at this time?
The Court: If you remember anybody else. Did you see anybody else?
The Witness: In the past—yes.
The Court: Who?
The Witness: Pemberton, Jim Pemberton.
The Court: Who else?
The Witness: George Faria.
The Court: Who else?
The Witness: I can't remember any others.
The Court: All right.

Q. Do you remember what you saw Knupp do with the units?
A. Turn a screw. Take a screw driver in his hand and turn a screw.

The Court: All right.

Q. And did you see whether the unit worked or not when [fol. 666] Foo came to look at it?

Mr. Angoff: Pardon me, Foo hasn't come yet. Knupp just finished turning the screw. Foo hasn't arrived, anyway.

Q. Did you see Foo then come thereafter and look at the unit?
A. Yes.
Q. And did you see whether or not the unit then worked?
A. I saw the unit placed in a chamber, code coming off on a tape and the code on the tape appeared to be the correct code then.

The Court: You were near enough to see?
The Witness: Yes. To see—
The Court: You must be very close to read a tape, don't you?
The Witness: No, sir.

The Court: How close do you have to be to a tape to reads dots and dashes correctly?

The Witness: About 3 feet.

The Court: How far?

The Witness: I think at 3 feet you could read the code. It is better to be about a foot and a half of your head away from the paper.

The Court: Were you as close as that?

The Witness: 3 feet, yes.

The Court: And you could read the symbols?

[fol. 667] The Witness: Yes.

Q. Now, was there any occasion on which you gave any information to Viola Faria concerning the samples that she was testing?

A. There were times when I handed Viola a card. This card belonged to the unit in tests. On the card would have letters. I handed her this card.

Q. Why did you hand her the card?

Mr. Angoff: Your Honor, I object to the question starting with the word "Why." "Why" can permit inward feelings, introspection, and he can answer any question if you let him get away with it.

The Court: Despite the intimidation I am going to sustain the objection.

Mr. Angoff: Thank you.

The Court: Will you be good enough to say whether you received any instruction, an order or a command with respect to that card which you handed Viola? Did anybody tell you to?

The Witness: Yes.

The Court: Who told you?

The Witness: Viola and Bob Knupp.

The Court: You mean Viola asked for a card and Bob Knupp said, "Give it to her"; is that what you mean?

The Witness: Yes.

Q. What was your purpose in giving her the card?

[fol. 668] Mr. Angoff: I object.

The Court: Never mind what the purpose was. That isn't relevant unless you suggest he was in some way a co-conspirator.

Mr. Caner: He is so named, your Honor.

Mr. Angoff: Co-conspirator who is not named and has not been indicted.

The Court: Was he named?

Mr. Angoff: Yes, but not indicted. Is that correct?

Mr. Mitchell: He is named.

Mr. Angoff: And not indicted.

The Court: There is no law you must proceed against every traffic violator.

Mr. Angoff: No, but I wanted to straighten out Mr. Mitchell.

The Court: He is most appreciative. Viola asked you for the card. Knupp told you to give it to her. Why did you do it?

The Witness: Because I was told.

Q. Do you know what she did with the information that was contained on the card?

The Court: Not "Do you know." What did you see?

The Witness: I saw her look at the card.

Q. What did you see her do after that?

A. What she did after that, what I could see my eyes—

[fol. 669] The Court: We are not interested in what you surmised.

The Witness: I saw her continue with her normal tests.

The Court: Strike out entirely your answer. You can only tell us what you saw.

The Witness: That's what I was trying to put across.

The Court: You just saw her act the way she usually acted?

The Witness: Yes.

Q. Did you give her any other information besides the card?

A. No, sir.

Q. Now would you repeat again for me, please, what was contained on the card which you gave her?

A. The card for the unit has a temperature letter on the card. I believe it is two letters.

The Court: Just a moment. You have seen these cards. The rest of us have not. Will you describe a card for us? How large was it, a calling card size, a letter size, or what?

The Witness: I would say about 3 inches square. It contained the unit number.

The Court: A little larger than a playing card, is that it? Square, but not rectangular?

The Witness: It is a square card, only bigger.

[fol. 670] The Court: Instead of being rectangular it was square?

The Witness: I believe so, yes, sir.

The Court: What did it have on it?

The Witness: The unit number on it.

The Court: Just a number?

The Witness: And then it had some other information. I can't remember all that's on the card. I know it has on the card a temperature—

The Court: No. What did this card have on it?

The Witness: Writing.

The Court: Printing?

The Witness: Printing.

The Court: You can't tell us anything more? You don't know whether it had on it, for example, dots and dashes?

The Witness: It didn't have dots and dashes.

The Court: Did it have on it capital letters?

The Witness: I don't know.

The Court: You can only tell us it had printing?

The Witness: Yes, sir.

The Court: And a number?

The Witness: Yes, sir.

Q. Was the card that you refer to a calibration chart?

The Court: He cannot tell us if he couldn't tell what was on the card. It might have a lot of secrets on it.

[fol. 671] Q. Do you know what a calibration chart is?

A. Yes, sir.

Q. Was this a calibration chart?

A. No, sir.

Q. Did it contain on it initials—I show you Government's Exhibit 6. Do you recognize Government's Exhibit 6?

A. It is a calibration chart.

Q. And at the upper right-hand corner it has the designation initials 58 GN, in the case of this chart?

A. Yes.

Q. Did the card that you gave Mrs. Faria have on it anything comparable to the initials 58 GN which appears on the calibration chart?

A. It had printing. I am not exactly sure if it was 58 GN, or what. It had printing like that.

Q. Did you make up the card yourself which you gave to her?

A. No, sir.

Q. Someone else made it up, then?

A. Yes.

The Court: He can only say, "I didn't make it up." It was made up, and inferentially someone else did, but the jury draws the inference, he doesn't.

Q. I ask you, did you see who made it up?

A. I know how the card—

The Court: No. Do you know who did it?

[fol. 672] The Witness: No.

The Court: If he didn't do it, it is obviously done by somebody else but that is an inference, not an observation.

Q. Did someone else give the card to you?

A. Excuse me. I see where I got confused.

The Court: All right. Go back.

The Witness: This card goes with the unit. I didn't hand Viola the card. The card stays with the unit.

The Court: So all you have told us in handing Viola a card and Mr. Knupp saying, "Give it to her" and Viola looking at the card and the card had on it printing and a number is qualified by the fact that the card was, in your present testimony, with the unit; is that right?

The Witness: Yes, sir.

The Court: And you didn't hand it to Viola at all?

The Witness: No, sir.

The Court: And nobody told you to hand it to Viola?

The Witness: Hand the unit, no, sir. That's what I would like to square away.

The Court: You better square it away. Go ahead.

The Witness: After a while the cards were taken off the samples. The units no longer had cards with them. If you knew the unit number, the unit number is with the chart that goes with the unit. On the chart you can tell what the temperature letters are. I gave Viola a slip [fol. 673] of paper telling what the temperature letter was for that unit, not the card but a piece of paper.

The Court: Let's go back over this once more. You gave Viola a piece of paper. Who told you to give to to her?

The Witness: Mr. Knupp.

The Court: What did he tell you, exactly?

The Witness: To give Viola the temperature letters for the units that were in test.

The Court: Temperature letters for the units that were what?

The Witness: Being tested in the temperature tests.

The Court: And where did you find the temperature letters for the units that were being tested?

The Witness: When Mr. Palliotto—

The Court: Where did you find them?

The Witness: Oh. (Brief pause.)

The Court: What are you looking at?

The Witness: I am looking for the file that kept the charts. We filed away the charts for the units and that is where I am looking for the letter.

The Court: You don't have to look at anything except you—I would think—you don't have to look at anything at all, never mind "except." I asked you where you looked for the temperature letters for the units that were being tested. Did you look in a book, did you look on a piece of paper?

[fol. 674] The Witness: I looked in this filing cabinet.

The Court: You mean you walked over to a filing cabinet? What did you do when you walked over to the filing cabinet?

The Witness: I looked for the unit number, for the chart that had the unit number that we wanted the letters for.

The Court: Did you find there, for each unit, a card?

The Witness: A chart.

The Court: A chart. What did you do, pick out a chart appropriate for the number?

The Witness: Yes.

The Court: Then what did you do?

The Witness: I wrote down the temperature code letters.

The Court: You got the chart and copied from it?

The Witness: Yes, the letters.

The Court: So that, if I understand you correctly, you copied two letters as, for example, BN, and you would write down what, BN or dash, three dots, two dashes?

The Witness: BN. The unit number and BN.

The Court: Unit number and symbols BN?

The Witness: Yes.

The Court: So on the piece of paper there would be Arabic numbers, which means the ordinary kind you write, and some capital letters, the capital letters standing for two letters in the Morse Code; is that right?

[fol. 675] The Witness: Yes, sir.

The Court: And that is what was on the sheet?

The Witness: Yes, sir.

The Court: You walked with that sheet of paper back to Viola?

The Witness: Yes, sir.

The Court: What did you do?

The Witness: Handed it to her.

The Court: And then—?

The Witness: Then I walked off.

The Court: You walked away?

The Witness: Yes.

The Court: Didn't you sit down and work?

The Witness: Well, sometimes.

The Court: Now you take back everything you said before about handing Viola a card rather than Viola asking you for one and Knupp saying, "Give it to her" and the card having on it printing and a number?

The Witness: Yes, sir.

The Court: You take it all back as being an error?

The Witness: Yes, sir.

The Court: We will take a recess for five minutes.

(Brief recess.)

[fol. 676] Q. Did there come a time, Mr. Rosenholm, when you had a conversation with Mr. St. Onge, concerning the procedure followed in the calibration test?

A. Yes.

Q. When did that conversation occur?

A. About August of 1957.

Q. Was there anyone else present besides you and St. Onge?

A. No, sir.

Q. Where did the conversation take place?

A. Mr. St. Onge's office.

Q. Will you tell us what the discussion was?

Mr. Angoff: I object.

The Court: The objection is sustained.

Mr. St. Clair: I object.

The Court: Sustained.

Q. Who was St. Onge?

A. His exact title, I am not sure.

Q. What did you observe him do in the plant?

A. He was like a production manager or something of that nature.

Q. Did he have to do with production of radiosondes among other things?

A. That was the [illegible] that actually he was over.

Q. Will you tell [illegible] what you said to him and what he said to you?

[fol. 677] Mr. Angoff: I object.

The Court: Sustained, and doubly sustained because it is in defiance of my ruling.

Q. Did you have a conversation with St. Onge concerning what you saw?

The Court: Sustained again, and in about one moment I will declare a terminal matter with respect to this case if—

Mr. Caner: May I approach the bench?

(Discussion at the bench between Court and counsel as follows:

Mr. Caner: I did not mean to defy the Court.

The Court: I sustained an objection on the ground the conversation was not binding on anyone who is a defendant in this case.

Mr. Caner: If the Court please, the purpose of this conversation—

The Court: I am not interested in the purpose.

Mr. Caner: The purpose of introducing the evidence—

The Court: I am not interested in the purpose. I am interested in the admissibility.

[fol. 678] Mr. Caner: Well, if the Court please, I submit that if this witness tells a representative of the corporation what is going on, and thereafter the corporation does not act, does not correct it, it is indicative of the attitude of the corporation towards what is happening.

The Court: The objection is sustained).

(End of conference at the bench.)

Q. Did you have a conversation with Robert Knupp concerning the locking of the humidity conditioning chamber?

A. Not of the locking—

Q. Did you have a conversation with him concerning the fact the chamber was locked?

A. (The witness shakes his head negatively.)

The Court: The answer is what? The witness shook his head negatively.

Q. Did you have a conversation with him concerning the opening of the lock?

A. No.

Q. Did you have a conversation with Robert Knupp in September of 1958 besides the humidity conditioning chamber?

A. Yes.

The Court: What was the month? I'm afraid I didn't hear it.

(The answer was read.)

[fol. 679] Q. 1957?

A. 1957.

Q. At that time was there a lock on either of the doors of the humidity conditioning chamber?

A. Yes.

The Court: If I understand this correctly, this might be called Conversation 2½? It comes between Conversation 2 and Conversation 3. Conversation 2 was the one which you had with Foo about Al Sawyer and took place in December of 1956. Conversation 3 was at the beginning of 1958, which you had with Mr. Knupp, about the FBI agent Joe Hester?

The Witness: Yes.

The Court: This is conversation 2½?

The Witness: Yes, sir.

Q. Who was present at the time of this conversation?

A. Mr. Knupp and myself.

Q. What did you say to Knupp and what did he say to you?

Mr. St. Clair: On behalf of Standard Coil, I object.

The Court: It is admitted only against Knupp, not against the corporation and not against Foo. Where was this conversation, aside the lock, next to the lock?

The Witness: No, sir.

The Court: Where was it?

[fol. 680] The Witness: It was beside the Pressure Calibration Station, in that area, near No. 6 on the big chart.

Q. Near the Humidity Zero Set point?

A. Yes.

Q. How many feet approximately is that from the humidity conditioning chamber?

A. I would estimate about 12.

Q. What was said in that conversation?

A. I asked Mr. Knupp not to open the lock. He told me to mind my own business.

The Court: Was that the whole of the conversation?

The Witness: That's about—that was the conversation.

Q. Did you see whether or not the lock was thereafter opened?

A. No, sir.

Q. Did there come a time while you were at the plant that you met a person by the name of Teichman?

A. Yes, sir.
Q. Who was Mr. Teichman?
A. He was a Standard Coil Company lawyer.
Q. Did you have a discussion with him?
A. Yes, sir.

The Court: Now there are all kinds of lawyers and I, therefore, am going to ask whether you know what kind [fol. 681] of lawyer he was, not whether he was good, bad or anything of that sort, but do you know whether he was a tax lawyer or a general lawyer or anything else about him?

The Witness: No, sir.

Q. Do you know why he was at the plant?
A. I can surmise why he was.

The Court: That is the last thing we want you to do.

Q. Did you have a discussion with him?
A. Yes, sir.
Q. Approximately when did you have the discussion?
A. I am not sure.

The Court: Can't you tell us whether it was 1958 or—?

The Witness: It was 1958.

The Court: Can't you tell us on reflection whether it was cold weather or hot weather?

The Witness: I believe it was in the month of February, but I'm not sure.

The Court: It is pretty cold around here. I don't know where the conversation took place. Where was it?

The Witness: In an office.

The Court: Well, an office where?

The Witness: Down on the first floor of the building.

[fol. 682] The Court: What building? Where was the building?

The Witness: On Spring Street, North Dighton.

The Court: I see.

Q. Was this—

The Court: How did you happen to get there—if you don't mind?

The Witness: I was called down there by the Personnel Manager.

The Court: Who called you?

The Witness: The Personnel Manager.

The Court: Of what?

The Witness: Of Standard Coil.

The Court: What is his name?

The Witness: Mr. Taska.

The Court: Mr. Taska told you to go to Mr. Teichman's office?

The Witness: He told me to come down to his office. Mr. Teichman was there.

The Court: Yes.

Q. Did you go with any person?

A. Viola Faria.

Q. What occurred when you arrived in the office with Viola Faria?

Mr. St. Clair: That is pretty broad. If we are asking [fol. 683] for conversation, why don't we ask it?

Mr. Angoff: I object to any conversation with a company lawyer, as he described him, in so far as it relates to the two individual defendants.

The Court: I agree it isn't admissible against either of the defendants. I am not even quite clear it is admissible against the corporation at this stage. But I think I will allow it against the corporation because, as I understand it, the testimony is that the Personnel Manager Taska told you to come down to his office, and you found a man named Teichman. I take it that your testimony means Mr. Taska introduced you to Mr. Teichman?

The Witness: Yes.

The Court: When he introduced you, he told you who Mr. Teichman was?

The Witness: Yes.

The Court: What did he say?

The Witness: I'm not exactly sure what his words were.

The Court: Of course you are not.

The Witness: I believe he said, "This is a company lawyer."

The Court: In general, something like that?

The Witness: Yes.

The Court: I think that is an adequate basis to admit [fol. 684] the conversation against the corporation but not against the individual defendants.

What then happened in the way of conversation? Who said what?

Mr. St. Clair: Just for the record, I will preserve my rights, your Honor.

The Court: What are your rights under these circumstances? I mean you always have the right to stand. But what is your objection, because I don't know what it is?

Mr. St. Clair: Well, if your Honor please, there is no showing of any authority, not even an attempt to show the authority.

The Court: There can be no doubt, if the President of a corporation said that Clarence Darrow was the company lawyer, and Clarence Darrow was there, that is a sufficient showing that Clarence Darrow was the company lawyer. There can be very little doubt, it seems to me, that the Personnel man introducing X to a Junior and saying to the Junior, "X is the company lawyer," has adequate authority to tell that individual, the subordinate employee, that X is the company lawyer. He might be mistaken, but it is within his authority.

Mr. St. Clair: Yes. I am not addressing my remarks to Mr. Taska.

The Court: That is the only one who said he was the [fol. 685] company lawyer.

Mr. St. Clair: I am addressing my remarks to the authority of Mr. Teichman.

The Court: Mr. Taska said Mr. Teichman was the lawyer, company lawyer.

Mr. St. Clair: Well, all right. I will withdraw the objection.

The Court: All right.

Q. Now what was said in the discussion?

A. Mr. Taska asked me to explain to Mr. Teichman what was going on up in the radiosonde test area, calibration area. I explained to him what was going on.

The Court: So what happened next? Who said something after that?

The Witness: Well, when I had finished explaining to him what had been happening in the area—

The Court: Nobody is claiming any privilege, which would raise a nice question.

The Witness: What is that, please? When I finished explaining what was happening in the area—

Mr. St. Clair: If your Honor please, with great reluctance, I do not respond fully to that remark. But it is not my decision to claim a privilege in this case, although—

The Court: Your client does not want to claim the [fol. 686] privilege which is available?

Mr. St. Clair: I am not certain it is available in view of a prior ruling. But in any event—

The Court: I think it is clearly available at this stage because, as I understand it, what is happening at this stage is that in connection with the preparation of a litigation, a company retains a lawyer, and the lawyer comes around to find out what the facts are from a subordinate. Now you may say that you would just as soon have the jury hear about it. You have the right to claim the privilege whether it is damaging or not damaging.

Mr. St. Clair: May I have just a moment?

(Defense counsel confer.)

Mr. St. Clair: Do I understand this question in your Honor's view calls for a recitation by this witness of a long series of what he might describe as irregular acts? I don't understand the question.

[fol. 687]

COLLOQUY BETWEEN COURT AND COUNSEL

The Court: As I understand the testimony at this stage, the situation is one in which a company has a lawyer and a personnel officer asks a junior officer to come down and talk about the matter to the company's lawyer. At this stage it is exactly like any individual consulting a lawyer with respect to matters within the professional competence of the lawyer and is covered by the attorney-client privilege. The mere fact that the client in this case is a corporation

does not mean that the disclosures have to be made to the attorney by the president of the company. The corporation necessarily acts through its officers and employees and agents. When a person is within the scope of that action for the corporation and the corporation has a lawyer, the discussion between that individual and the corporate attorney is within the client-attorney privilege. The problems which have previously arisen as to which I made reference at the bench are whether a particular person is an attorney, but the testimony here indicates that this individual was a member of the bar called by the company with respect to some question and that the company wanted to have legal advice from him.

Mr. St. Clair: Your Honor is well aware of the tactical problem here presented and I somewhat resent the position the United States Attorney is taking—

The Court: We won't discuss it. I want you to be quite [fol. 688] clear, Mr. Foreman and members of the jury, that the claim of privilege with respect to an attorney-client situation in no way suggests something discreditable. Let me give you a very simple example. I may be in a case in which I know perfectly well that the wrong was done by Jones and not by myself, and I may be accused of a crime and I may tell my lawyer that I know that Jones did it but I don't want to tell anybody because Jones is my brother-in-law and therefore when the time comes you are asked about this conversation, I want you to insist on the client-attorney privilege, not because I am guilty but because I want to protect Jones. For all you and I know, in this situation the attorney-client privilege may be claimed to shield somebody else or to shield the company or for an innocent purpose and you must not draw any inference at all. It will be quite contrary to the whole theory of the doctrine of privilege. The doctrine of privilege means something must not be inquired into. When a subject is as delicate as this lawyers ordinarily approach the bench to make sure you don't get into the situation. I don't mean you mean any breach of the custom.

Mr. St. Clair: I raised the question this morning at the bench.

The Court: But not in this particular form.

Mr. St. Clair: It is precisely the question I raised.

[fol. 689] The Court: I am afraid I didn't appreciate it was in that form. I said I would follow the United Shoe case, didn't I?

Mr. Angoff: Yes.

Mr. St. Clair: I am going to call Mr. Ely to the stand and make them claim privilege.

Mr. Caner: May we approach the bench at this time?

The Court: Yes. I may have misled everybody; that is perfectly possible. Evidently both counsel on all sides think they were misled.

(Conference at the bench:)

The Court: I didn't know what this was. I thought we had an intra-office counsel. That's what I thought the problem was.

Mr. Caner: If the Court please, a couple of points I would like to make clear concerning testimony through this witness and later witnesses. First of all, in this connection there were other persons present besides the lawyer.

The Court: They were all persons connected with the company, on his testimony so far.

Mr. Caner: In regard to this, the Government's theory is that Teichman, an agent of the company, is apprised as [fol. 690] to what is going on; that thereafter no steps were taken. The people involved are retained. Moreover, through other witnesses, that he affirmatively attempts to conceal what is going on.

The Court: If you prove that, I will let the conversation in but I will not allow you to do it by hypothesis.

(End of conference at the bench.)

The Court: I want to make it quite clear that apparently I did not make myself as clear as I should have at a bench conference previously. I referred to United States v. United Shoe Machinery Corporation, which has nothing to do with this problem as it has developed. I misunderstood what the question was to be when I made that reference and I am perhaps entirely responsible for the misunderstanding. I know often a Judge doesn't speak as clearly as he

should and counsel are not to be blamed for misunderstanding.

Q. Now, after you have said the things you have referred to to Teichman did he hand you any paper?
A. He indicated the paper on a desk.
Q. Did this paper have anything on it?
A. Writing, printing.

The Court: I beg your pardon?
[fol. 691] The Witness: Printing on the paper.
The Court: I don't know whether you are not getting into the whole business I have tried to exclude. As far as I can tell at this stage, it is a conversation between agents and employees of a corporation and a lawyer with respect to a legal matter. I can't tell it isn't. If it is something else, you have to prove it aliunde.

Q. And was this paper made up while you were talking?
A. No, sir. Not to my knowledge.

The Court: That hasn't anything to do with it. If I am about to consult a lawyer I can dictate to my secretary a memorandum of what I am going to talk about to my lawyer and the memorandum which I dictate to my secretary isn't in the privilege, although done in advance. You must not take a negative view of the attorney-client privilege. Under modern conditions the attorney-client privilege is sufficiently embracing to involve the preparatory step which is appropriate and you have in connection with the computation.

Q. And were you asked to do anything with respect to this paper?
A. Yes.

The Court: May I again say to you that I will not let you get in by the side door, the window or some other way this conversation. If you are going to prove what you suggested [fol. 692] at the bench, prove it. I will give you a recess until tomorrow if you wish.
Mr. Caner: Would you, please, your Honor?
The Court: Yes, and you understand clearly that if you can establish what you suggested at the bench, then it is,

of course, outside the attorney-client privilege. If you cannot establish it, I intend to protect not only the exact words on the exact occasion, but the preparatory step, the consequences and everything which relates directly to the conversations which relates to the general scope of privilege.

(Adjournment.)

[fol. 693]

EIGHTH DAY

Court Room No. 6
Federal Building, Boston
Tuesday, September 20, 1960

ROBERT ROSENHOLM, Resumed

Direct examination.

By Mr. Caner, Continued:

Mr. Caner: May we approach the bench?

(Conference at the bench as follows:

Mr. Caner: I have a memorandum which I would like to present to you.

The Court: I will receive the memorandum. You don't have to do that at the bench, you can just hand it to me. Whether I will read it is another question, I don't answer that for the record.)

Q. Yesterday, Mr. Rosenholm, you said you believed at the time when you were called by Mr. Hester to his office and introduced to Mr. Teichman, that was February 1958. Are you sure of that date?

A. No, sir.

Q. What is your best recollection of when that occurred?

A. Approximately September 1957.

The Court: May I ask if you talked with counsel while [fol. 694] testifying in this case?

The Witness: Yes, sir.

Mr. Caner: May we approach the bench?

The Court: You don't have to approach the bench, that requires no explanation. It isn't in a criminal case, correct.

Q. I want to get back a minute, you were first employed in the Quality Control Department, were you not?

A. Yes, sir.

Q. When you first went in there you were a pressure test operator?

A. No, sir.

Q. What were you when you first went in there?

A. I worked in the final operational station.

Q. You also operated the pressure test from time to time?

A. Yes.

Q. Your superior at that point was who?

A. My immediate superior was Al Sawyer, over whom was Mr. Foo.

Q. When was it that you changed to the Production Department?

A. Approximately five months I believe after I started. That must have been about January of 1957.

Q. Who were your superiors in the Production Department after that?

A. First it was Mr. Knupp, then Mr. Murphy.

The Court: Speak louder.

[fol. 695] The Witness: Then came Joe St. Onge. Then came Al Gramm. Excuse me. I am not sure of the last name. Al Gramm and Joe St. Onge, they came into the building, the plant. I don't believe they started at the very beginning of the operation. I cannot be sure of the last two now.

Q. Starting in 1957 was Gramm the head of the Production Department?

A. I am not sure, sir.

Q. Will you say that by August of 1957 he was head of the Production Department?

A. Yes, I would say so.

Q. By August of 1957 was St. Onge below him in the department?

A. Yes, to the best of my knowledge.

Q. And above you. While you were in the plant did you have any discussions with the operators of the tests regarding keeping a watch for Palliotto?

A. Yes.

Mr. Angoff: I ask that be struck out.

The Court: It certainly is the kind of direct leading question on a difficult point which ought not ever to be put to a witness. The objection is sustained. There is nothing hitherto in the testimony which justifies that direct question, as though it were a summary of previous evidence. It is a leading question of the type that is not usual and ought not to have been put.

[fol. 696] Q. Did you at any time have any discussion with any of the test operators regarding Palliotto?

A. Yes.

Q. And with which test operators did you have those discussions?

A. All of them, that I know of.

The Court: With whom?

The Witness: With all of them.

The Court: You better give us the names.

The Witness: George Faria, Viola Faria, James Pemberton, Bob Martell.

Q. When did you have these discussions?

A. Approximately December 1956.

Q. With respect to the discussions with Pemberton what was said in that discussion?

Mr. Angoff: I object.

Mr. St. Clair: I object.

The Court: Pemberton certainly had no authority to speak for the corporation. I do not really understand how his testimony can be admissible if it is offered in connection with some sort of admission. The objection is sustained.

Q. Did you at any time give any instructions to any of the test operators concerning Palliotto?

Mr. Angoff: I object.

The Court: That you may tell, did you give any instructions?

[fol. 697] A. Yes.

Q. With respect to the test operator Pemberton, what instructions did you give him?

Mr. Angoff: I object.
Mr. St. Clair: I object.
The Court: You may tell us.
The Witness: Not to tell Mr. Palliotto.
The Court: Not to tell Mr. Palliotto?
The Witness: Yes.

Q. What?
A. What was going on concerning the tests.
Q. With respect to the test operator, George Faria, did you give him any instructions regarding Palliotto?

Mr. Angoff: I object.
The Court: Overruled.
The Witness: The same as Mr. Pemberton.
Mr. St. Clair: Just answer.
The Court: Do not incorporate by reference. Do you understand what incorporate by reference means?
The Witness: Yes.
The Court: Tell us specifically.
The Witness: Not to tell Mr. Palliotto.
Mr. St. Clair: The question was, did you give any instructions? The answer is, either Yes or No. I did not object.
[fol. 698] The Court: The answer is Yes. What were the instructions?
Mr. St. Clair: Objection.
The Court: Overruled.
The Witness: Yes.

Q. What instructions did you give him?
A. Not to tell Mr. Palliotto.
Q. With respect to Viola Faria did you give her any instructions respecting Palliotto?

The Court: Are you taking turns at objecting on the same ground?

Mr. Angoff: Yes, your Honor.
The Court: Objection overruled.

Q. Can you answer that question Yes or No?
A. Yes.
Q. What instructions did you give?

Mr. St. Clair: Note my objection.
Mr. Angoff: Note mine.

Q. Did you give instructions to any other test operators?
A. Yes.
Q. Who else?

Mr. Angoff: I object of course.
The Court: Objection overruled.
The Witness: Bob Martell.

Q. Who else?
[fol. 699] A. I am trying to think of them. George Ferreria.

The Court: You have already told us.
The Witness: There are two of them, George Ferreria and one George Faria.

Q. With respect to Bob Martell, what instructions did you give him?

Mr. St. Clair: Note my objection.
Mr. Angoff: The same.
The Court: Overruled.
The Witness: Not to tell Mr. Palliotto what was happening concerning the tests.

Q. With respect to George Ferreria, what did you tell him?

Mr. Angoff: Note my objection.
Mr. St. Clair: I object.
The Court: Overruled.
The Witness: Not to tell Mr. Palliotto what was happening concerning the tests.

Q. Can you give us a Yes or No answer to this question: Did you have any discussion with Pemberton concerning how he was running the test?

A. Yes.

[fol. 700] Q. Did you have any discussion with Viola Faria concerning how she was running the test?

A. Yes.

Q. Did you have any discussion with George Faria concerning how he was running the test?

A. Yes.

Q. Did you have any discussion with Bob Martel as to how he was running the test?

A. Yes.

Q. Did you have any discussion with George Ferreria as to how he was running the test?

A. I can't remember.

Mr. St. Clair: What is that?

A. I don't remember.

Q. As to George Ferreria, you don't remember?

A. That is correct.

Mr. Angoff: Might I inquire, in order to save useless objections or sterile or futile ones, whether or not either of the individual defendants were present at these conversations?

The Court: There is no suggestion they were. I haven't admitted any of his conversations. This is just a method of laying the foundation for something I do not intend to admit.

Q. Do you know a person by the name of Manuel Soares?

[fol. 701] A. Yes.

The Court: How does he spell his name?

The Witness: S-o-a-r-e-s.

The Court: It is appropriate for a radiosonde test.

Q. Who was he?

A. Manuel Soares?

Q. Yes.

A. Assistant Foreman on the night shift, near the end.

The Court: Assistant Foreman of what?

The Witness: At the beginning—

The Court: I can't hear you. I do not suppose the jury can.

The Witness: I'm sorry. I will speak louder. The night shift supervisor.

The Court: The what?

The Witness: The night shift—

The Court: That is not what you said the first time. You said he was assistant superintendent or something.

The Witness: No, sir. I'm sorry.

The Court: What was he?

The Witness: In the beginning he was—his first job on the night shift was, he was assistant supervisor of the night shift.

Q. Did his position later change?

[fol. 702] A. Yes.

Q. To what?

A. Assistant foreman of the night shift.

Q. Employed by whom?

A. Standard Coil.

Q. Did you have any discussion with Soares concerning his part in the humidity test?

A. Yes.

Mr. Caner: May we approach the bench at this time?

The Court: Well, you know this is not one of the things I encourage. Come up.

(Conference at the bench between Court and counsel as follows:)

Mr. Caner: The Court said that you didn't think it was appropriate at this time to put in evidence of the discussions that were had. Now this man is named in the indictment as a coconspirator along with the other persons named. The Government proposes to recall him after a further foundation has been laid for these conversations.

The Court: I can't say anything until later. I agree he isn't permanently excused.

Mr. Caner: I thought I should report that to the Court.

[fol. 703] The Court: All right. You don't have to say that.

(End of Conference at the bench.)

The Court: Are you through with this stage of his testimony?

Mr. Caner: That is all of this witness.

The Court: It is understood you are subject to being recalled later for further direct testimony. Is there any cross-examination on this phase of his testimony, either Mr. St. Clair or Mr. Angoff?

Mr. Angoff: Yes.

The Court: Which one of you?

Mr. St. Clair: I have some questions, your Honor.

The Court: All right.

Cross examination.

By Mr. St. Clair:

Q. Yesterday, Mr. Rosenholm, you told us about an incident whereby you were to go get some printed cards with material on them, and gave them to Viola Faria, I guess, and then you told us that was not right, that what you did was you went to a filing cabinet and wrote some figures on a piece of paper. Is that right?

A. Yes.

[fol. 704] Q. Did you make up the first story out of whole cloth?

A. I don't understand what you're speaking of, sir.

The Court: The question is: was it a pure invention without any factual basis—?

The Witness: What I told—

The Court: —the first time?

The Witness: I was just confused.

Q. Had you talked with the United States Attorney about the facts in this case before you testified?

The Court: And by "the United States Attorney" that would mean all the assistants.

Q. Or any representative of the United States Attorney, before you testified?

A. I talked to Mr. Caner, yes.

Q. Was it in that discussion that you first recalled the fact that there were cards that had printing on them that you gave to Viola?

A. I didn't give Viola cards.

Q. Was it in that discussion you first recall that fact?

A. I can't remember.

Q. You can't remember. You had a talk with Mr. Caner last night about your statement, that you had a conversation in February of 1958, didn't you?

A. Yes, sir—no, sir.

Q. He told you in substance that couldn't have been, that [fol. 705] it had to be earlier for his case?

A. Not last night.

Q. When was it he told you this?

A. This morning I discussed it with him.

Q. I see. He told you then in substance that you had to be wrong because to fit his case it had to be September, isn't that right?

A. No, sir, it wasn't—

Q. How did you finally decide it was September instead of February? Did you have any notes?

A. No, sir.

Q. You finally decided that, however, after talking with Mr. Caner, isn't that right?

A. He questioned me on the date.

Q. Just answer my question. You finally decided to change the date after talking with Mr. Caner, isn't that right?

A. Yes.

Q. When you testified yesterday to February, 1958 you believed you were telling the truth, didn't you?

A. Yes.

Q. You had every intention to tell the truth, didn't you?

A. Yes.

Q. But you come in here this morning and now say it was September, 1957?

A. Yes.

[fol. 706] The Court: 1957?

Mr. St. Clair: That is right.

Q. Instead of February of 1958, is that right?

A. Yes.

Q. You know, of course, that by February of 1958 these contracts were virtually completed, don't you?

A. Yes.

Q. And any conversation you had by February of 1958

would be entirely meaningless in so far as this case is concerned, don't you?

A. Of that, I don't know.

Q. Weren't you told that in substance?

A. By whom?

Q. By anybody?

A. I don't recall.

Q. You don't recall that even though it happened this morning?

The Court: You are being asked about a conversation which must have taken place within the last hour and a half.

The Witness: Yes. I agreed to the fact Mr. Caner questioned me on it and that I had changed the date this morning.

Q. Have you finished your answer?

A. Yes.

[fol. 707] Q. Now have you made up anything else in the course of your testimony?

A. No.

Q. Is there anything else you would like to change?

A. Not at this time, no, sir.

The Court: I will excuse the jury for a moment.

(The jury leaves the court room at 10.18 a.m.)

The Court: Mr. Caner, as a matter of personal privilege do you want to make any statement?

Mr. Caner: As a matter of personal privilege?

The Court: Before I take action?

Mr. Caner: All I can say is that I have never known of any principle that I could not speak to a witness.

The Court: In the course of his testimony to induce him to change his testimony and to do it outside of court?

Mr. Caner: I had never known of any reason why I couldn't talk to a witness and ask if his testimony on a particular point was accurate. Nobody has ever said to me that that was improper, and I am completely astonished that the Court should think it was improper for me to have talked with the witness concerning his testimony.

The Court: (To the witness) You had better leave the room for a moment. I have directed the witness to leave the room.

[fol. 708] COLLOQUY BETWEEN COURT AND COUNSEL

(The witness leaves the court room.)

Mr. Caner: There is no way I know of to prepare a case other than talk to a witness.

The Court: This has nothing to do with the preparation of the case. This is *in medias res*: while the witness is on the stand during a recess counsel speaks with him privately about his testimony.

Mr. Caner: I had never known anything improper about that, your Honor.

The Court: You will very soon learn. Is there anything else you want to say as a fact about this matter?

Mr. Mitchell: Well, your Honor, it was partly at my suggestion that Mr. Caner questioned him concerning this.

The Court: You were here and you knew he was on the stand. You knew there was a recess. You know the principle that a witness must be examined in public. You know that, without suggesting for a moment that you offered any improper inducement, tampering with a witness is one of the most dangerous things in connection with a case, and particularly a criminal case, that a person should be left entirely alone during the course of his testimony. You must know that elementary fact and elementary rule.

Mr. Mitchell: We wanted the truth to come out, your Honor.

[fol. 709] The Court: Thank you. I am glad that the truth has come out.

Mr. Caner: Your Honor, I want to disclaim any intention or act of tampering with the witness.

The Court: It depends upon what you call tampering. The facts speak for themselves.

Is there any other fact I haven't had called to my attention?

Mr. Caner: I do not want Mr. Mitchell to share the blame on this matter, your Honor.

The Court: I am not proposing to take any disciplinary action against you or against Mr. Mitchell. I am merely

interested in whether this is a situation in which I must respond to a motion.

[fol. 710] Mr. Caner: Well, if the Court please, the matter which I talked to him about in regard to the date is a matter that other witnesses will testify to, concerning when it happened. It can be ascertained when it happened.

The Court: Surely it can be ascertained by examination in public. I haven't any doubt that he can properly have his attention called in public to errors, and suggestions can be made to him as to the impropriety of dates.

But this was done, according to your testimony and the witness', outside of court, either in the office of the United States Attorney or somewhere like that.

Mr. Mitchell: Your Honor, would it help you if we told you exactly what we said to the witness concerning this matter?

The Court: I told you you could make any statement you want to make. I haven't prevented your stating any facts you deem to be relevant. I am not talking about arguments; I am talking about facts.

Mr. Caner: Well, I asked the witness whether the discussion with Teichman was before or after the FBI investigation, and whether he made the statement in the course of the FBI investigation.

I showed him the statement, and he observed the date on the statement. I then asked him what was his best memory as to the date at which the conversation with Teich-[fol. 711] man took place, and he stated that it was September of 1957. That was what happened, and I have never been aware of any impropriety of doing such a thing, your Honor.

The Court: I didn't mean that you were personally deliberately doing something you knew to be wicked. I am merely inquiring as to what the facts were, and whether that constitutes such a prejudice to the defendants, quite apart from your intent, as to create a situation in which the Court must act in response to a motion.

Mr. Caner: I submit, your Honor, that no prejudice to the defendants arises, because the true facts will come out during the course of trial as to when the discussion occurred.

The Court: This is the argument which prosecutors always make with respect to every violation of civil liberties, whether it is a violation of the Fourth Amendment or a violation of the Fifth Amendment, or anything else, that this is the way to discover the truth, never mind the means.

Mr. Caner: Well, if the Court please, I submit that the point is—the actual time is not a point on which the case swings.

The Court: It happens to be of the greatest importance, because I gave you a recess for the very purpose of laying the proper foundation, if one could be laid, with regard to the admission of what you regarded, and I take it the defense regarded, as a significant or potentially significant [fol. 712] piece of testimony, which had to do with whether there was a continuous conspiracy involving the attorneys, other officers of the corporation, other co-conspirators alleged in the indictment, and the defendants on trial. It was the very heart of one part of the case.

Mr. Caner: The Court said we could prove it aliunde.

The Court: Yes, and I am trying to point out that the whole nub of one aspect of the case turns on whether indeed there was a co-conspiracy, and that you sought to prove this by testimony of the conversation in which an attorney participated. The date of that conversation was of the greatest consequence. The date of that conversation was covered in the direct testimony yesterday and was the subject, by your own admission, of an out-of-court discussion with the witness while he was on the stand, a few minutes before the opening session of the court. I think I have fairly stated what the problem is.

Mr. St. Clair: If your Honor please, I assume that my brothers are finished. I don't by any means intend to infer any conscious wrongdoing.

The Court: I think it should be made clear one hundred per cent on the record that nobody thinks either Mr. Caner or Mr. Mitchell, being fully aware of the canons and proprieties of the situation, deliberately flouted them in order to do an injustice. No one thinks they had a wicked intent. [fol. 713] Mr. St. Clair: That is right. However, it

should be brought out on the stand in direct examination if it was felt that the date was wrong.

However, it does put the defense in a very difficult position to try a case under these circumstances. I don't know how much has already gone on in this respect. I am certain no more of it will go on, but it would seem to me at the very most your Honor might entertain a motion for acquittal, which I now make on behalf of the corporation, and at the very least you ought to strike the testimony of this witness.

MOTION FOR JUDGMENT OF ACQUITTAL

Mr. Angoff: I now make on behalf of the individual defendants Robert Knupp and Fong Foo a motion for judgment of acquittal.

The Court: Do you want to be heard?

Mr. Caner: Yes, if the Court please. I submit that the very most that should be done in regard to these motions is to strike the testimony of the witness, or such portion of his testimony as the Court feels has been prejudiced by what the Court states was not proper.

And in the public interest, I submit that the case should not be dismissed on account of the incident that has just occurred. There are many witnesses to be heard from, many more besides this witness. We have not heard the testimony of any of the test operators. We have only heard three witnesses in a case involving many witnesses.

[fol. 714] I submit that at this stage to dismiss the case would make it doubtful that justice would be done.

The Court: Will you call the Jury, and the witness will take the stand.

(The Jury returns to the court room, and the witness resumes the stand.)

The Court: Mr. Foreman and Members of the Jury, before I say anything else, let me make it absolutely clear that counsel for the defendants as well as the Court are persuaded that neither the United States Attorney nor either of his assistants consciously or deliberately violated any canon with which they were familiar. They were acting subjectively in good faith, and I do not mean at any

stage of the remarks I am about to make to criticize them in the sense that I believe that they were conscious wrongdoers.

On the other hand, a criminal prosecution is the most solemn proceeding which takes place in a court, and one of the most solemn activities with which man could be concerned on earth. The standards of a criminal prosecution in the United States require a constant awareness of the rights and liberties guaranteed by the United States Constitution, and a constant sensitivity with respect to the value of an open trial conducted with a full protection of the rights of any individual or any corporation summoned to answer a criminal charge.

In the case before you there have been a number of [fol. 715] difficult problems, and I have no question that you have been presented with witnesses who were the best that the government could offer, but they were witnesses who on the stand showed a lamentable lack of awareness or lack of capacity in connection with their testimonial obligations.

Frequently during the trial of this case I have had to do what I never did before in eighteen and one-half years, remind the witnesses of the solemnity of their function, and the necessity that they should recall accurately and state accurately the testimony which they were giving in matters of the utmost significance.

Were I not engaged in such a serious set of remarks to you, I would be tempted to rest upon a story which Chief Justice Wilkins told at the Judicial Conference, somewhat different from the one that I recited to you the other day. He referred to a case tried by Judge Otis Lord of the Superior Court of the Commonwealth of Massachusetts in the middle of the 19th century, and he said that after the most fluctuating kind of testimony by witnesses in that criminal case Justice Lord in addressing the jury said, "I think it would be sufficient if I instructed you that if you believe the witnesses for the government you will convict the prisoner; if you believe the witnesses for the prisoner, you will acquit him; if, like myself, you do not believe either of them you will then acquit the prisoner be-

cause the government has the burden of proof beyond a [fol. 716] reasonable doubt."

And though that story may seem to you to be humorous, I think you will also say that it has considerable application to the difficulties which we have faced in this case.

That is not to say that the difficulties were created by the United States Attorney or his assistants. They were faced by them. It is in the atmosphere of this fluctuating testimony that yesterday afternoon we had testimony on a most vital point given by Mr. Rosenholm. You cannot fully appreciate how vital, because you haven't read the text of the indictment and I have not hitherto had any occasion to discuss with you the problem of conspiracy, which is one of the essential elements in a part of this indictment. And you can't know, as I do, that the prosecution was endeavoring to show that a lawyer, together with others not named as defendants, together with the defendants, conspired to defraud the United States, that in this connection the admissibility of the testimony depended to a very considerable extent upon the date of an alleged conference in which the attorney participated. But you did hear that that date was given by this witness, Mr. Rosenholm, on the stand yesterday, and that I declared a recess yesterday afternoon in order that the government might be fully prepared to lay a foundation for the admissibility of the testimony that it relied upon with respect to this alleged conspiratorial conference.

[fol. 717] During the recess, and without in any way being conscious of a potential violation of any canon of ethics or any rule or principle, the Assistant United States Attorneys in this case admittedly conferred with this witness who was on the stand, and the conference with him took place either in the offices of the United States Attorney or in some similar place. It took place this morning before court, not under the supervision of a judge, and without the presence of the defendants or counsel for the defendants.

In this situation the witness took the stand this morning and on this very vital point gave an altered version in which the date now given becomes quite significant and

has a connotation and importance which the date he gave yesterday did not have.

He is a witness who already has shown either a lamentable lack of memory or an extraordinary power of inventiveness, as you will recall in connection with the cards where he gave a whole series of answers which he withdrew.

With due regard for the principles of justice under law, I must bear in mind not only what may be correct, but what is fair. In our constitutional system, under our jurisprudence, many things which are true are not allowed to be shown. Examples are a confession extorted by physical coercion; such a confession is not admissible although it [fol. 718] may be perfectly correct and the defendant may be guilty. Likewise, information procured by an unlawful search and seizure may be perfectly true and the defendant may be guilty; nonetheless it is well settled that no conviction can be based lawfully upon information unconstitutionally procured by an unreasonable search or seizure.

These principles illustrate the sensitivity of American courts to fair play in connection with every aspect of the criminal law. It is not the duty of a court to see that every guilty man is punished. It is the duty of a court to see that every man gets a fair trial. The highest public interest is not the punishment of the wicked, but the establishment and maintenance of justice under law.

Verdicts of Acquittal

Bearing in mind those principles, and responding to the motions of acquittal made by counsel for the individual defendants and the corporate defendant, I direct you at this stage to return the verdicts of acquittal with respect to each of the individuals and with respect to the corporation.

(The Court then heard requests of Jurors to be excused.)

The Court: The defendants will stand. (The defendants complied.) You have been acquitted by direction of the Court and by the Court. Your bail is terminated. You are free.

Adjourned

[fol. 719] Clerk's Certificate to foregoing transcript (omitted in printing).

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

FONG FOO AND ROBERT KNUPP,

Petitioners,

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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FONG FOO AND ROBERT KNUPP,

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UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioners pray that a writ of certiorari issue to review the order of mandamus of the United States Court of Appeals for the First Circuit, entered in this case on February 2, 1961, setting aside a judgment of acquittal entered in favor of the petitioners by the United States District Court for the District of Massachusetts and ordering that the petitioners be tried again.

OPINIONS BELOW

There was no formal opinion of the District Court. Excerpts of the transcript in that Court, including the judge's statement on granting the judgment of acquittal, are reproduced in Appendix B to this Petition.

The opinion of the Court of Appeals has not yet been reported. It is reproduced in Appendix A to this Petition.

JURISDICTION

The Order of the Court of Appeals was entered on February 2, 1961. On February 27, 1961, Mr. Justice

Frankfurter extended the time for filing a petition for certiorari herein to and including March 15, 1961. This Court has jurisdiction to review the order herein by writ of certiorari under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

A court of appeals issues a writ of mandamus setting aside a judgment of acquittal entered by a federal district court in the trial of a criminal case on motion of the defendants, and orders that the defendants be tried again.

1. Assuming, as the court of appeals held, that the district judge had no power to grant a judgment of acquittal in the circumstances of this case, can the defendants be placed in jeopardy a second time, before another jury, although they never moved for a mistrial, and no compelling necessity existed for terminating the original trial?

2. May a court of appeals, on a petition for mandamus, review a judgment of acquittal to determine the reasons for which it was entered and:

(a) whether an acquittal for those reasons is within the power of a trial judge, and

(b) whether the facts of the case justified an acquittal for those reasons?

3. Does a district judge have the power to grant a judgment of acquittal before the prosecution has put in all of its evidence, if he believes that justice so requires for the following reasons:

(a) the testimony already presented is so contradictory and unreliable that it could not support a conviction;

(b) the prosecutor has improperly spoken to a witness, outside of the courtroom, in a manner which destroys the reliability of the witness's testimony regarding a crucial issue in the case.

STATUTES, CONSTITUTION, AND RULE INVOLVED

The Fifth Amendment to the Constitution of the United States provides in pertinent part as follows:

> "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . ."

The statute describing the situations in which the Government may appeal in criminal cases, 18 U.S.C. § 3731, reads in pertinent part as follows:

> "An appeal may be taken by and on behalf of the United States from the district courts direct to the Supreme Court of the United States in all criminal cases in the following instances:
>
> "From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof, where such decision or judgment is based upon the invalidity or construction of the statute upon which the indictment or information is founded.
>
> "From a decision arresting a judgment of conviction for insufficiency of the indictment or information, where such decision is based upon the invalidity or construction of the statute upon which the indictment or information is founded.
>
> "From the decision or judgment sustaining a motion in bar, when the defendant has not been put in jeopardy.
>
> "An appeal may be taken by and on behalf of the United States from the district courts to a court of appeals in all criminal cases, in the following instances:
>
> "From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof except where a direct appeal to the Supreme Court of the United States is provided by this section.
>
> "From a decision arresting a judgment of conviction except where a direct appeal to the Supreme Court of the United States is provided by this section.

"The appeal in all such cases shall be taken within thirty days after the decision or judgment has been rendered and shall be diligently prosecuted."

* * * *

The "all writs" section of the Judicial Code, 28 U.S.C. § 1651 (a), upon which the court of appeals relied for jurisdiction to issue a writ of mandamus in this case, provides as follows:

"The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

* * * *

Rule 29 (a) of the Federal Rules of Criminal Procedure, dealing with motions for judgment of acquittal, provides as follows:

"Motions for directed verdict are abolished and motions for judgment of acquittal shall be used in their place. The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses. If a defendant's motion for judgment of acquittal at the close of the evidence offered by the government is not granted, the defendant may offer evidence without having reserved the right."

* * * *

STATEMENT

The District Court Proceedings

The petitioners here are Fong Foo and Robert Knupp, employees of Standard Coil Products Co., Inc. On September 18, 1960, the petitioners were brought to trial,

along with their employer, in the District Court for the District of Massachusetts on indictments charging them with having concealed, and conspired to conceal, material facts within the jurisdiction of a Government agency in violation of 18 U. S. C. §371 and § 1001. (R. 11) The fraud alleged related to the testing of radiosondes being manufactured at their employer's plant for the Army Signal Supply Agency. A jury was duly empaneled and sworn, and the Government began to present its case.

According to the prosecutor's opening statement, the case would consist of two parts: first, a technical explanation of how the tests were supposed to have been performed and, second, testimony as to how the tests were falsified (Tr. 2-6).[1]

With respect to the first part of its case, the prosecution called as a witness a Government employee named Paliatto, who had been stationed at the company's plant for the purposes of supervising the testing in question, and who had initiated the investigation which led to the indictment. (Tr. 362). His testimony lasted for several days. In the words of the Court of Appeals, it was "confused and conflicting." (App. A-7)[2] After he had

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[1] The transcript of testimony in the district court is a separate volume of the certified record herein, and is separately paginated. References to that transcript will be indicated by the abbreviation "Tr."

[2] Whether the confusion and conflict in this witness' testimony was caused by or was the cause of questions and comments made by the trial judge is immaterial to the questions here presented. The Court of Appeals was of the view that the trial judge was the one at fault. We believe an examination of the record will disclose the contrary.

Although the trial judge has indicated by letter to the Chief Justice that he does not wish to defend his actions—and we agree that such defense is immaterial to this case—we believe in all fairness we should point out that the characterization of the judge's conduct by the Court of Appeals was wholly unjustified. It is true that the trial judge examined the Government's witnesses extensively. It may

testified for several days, the trial judge excused the jury and suggested to Government counsel that they should consider whether to *nol prosse* the case (Tr. 371-72, App. B-2, 3). He said that, in his view, there was "no chance whatsoever that this jury would convict these defendants if a conviction required any credit of Mr. Paliatto" (Tr. 373-74, App. B-3). Further, he said, "if in the end the jury did believe this witness, I think it would be almost inevitable that I would have to set aside the verdict . . ." (Tr. 377, App. B-5). The United States Attorney objected to the suggestion on the ground that Paliatto was not a fraud witness, but only an explanatory witness, and that subsequent witnesses would adequately prove the

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even be, as the Court of Appeals stated, that "fully as many questions" were asked by the judge as by the prosecutor. We submit, however, that any fair examination of the record as a whole will reveal that virtually all of the questions asked by the judge were intended to clarify for the jury a large amount of highly technical information. It is wholly unfair to say that the judge "cross-examined" the witnesses solely out of solicitude for the accused. To the contrary, a fair reading of the record will show, we believe, that the judge was attempting to assist the jury in understanding highly technical testimony which was being poorly elicited by the prosecutor and that this attempt was at least as useful to the prosecution as to the defense.

On a few occasions the judge did lose his patience with the witnesses. On those occasions he did address them sharply and remind them of the seriousness of the business in which they were involved. There were also occasions when the judge was unable to hide his amusement over the witnesses' peculiar use of language. On the whole, however, the tone of the judge's questioning was not antagonistic, at least at the beginning. It was calculated to elicit clear and comprehensible testimony, not to intimidate, confuse, or ridicule the witnesses. Were it not for the judge's participation, we believe, the testimony would have been infinitely more confusing than it was.

Particularly instructive as to the clarification achieved by the trial judge is the episode on pages 92-93 of the transcript. Paliatto testified that the machine used to conduct the tests claimed by the Government to have been fraudulent made "spurious marks." The trial judge, after extensive questioning of the witness, was able to establish that by "spurious" the witness meant simply on the "spur of the moment"—i.e., "instantaneous."

fraud (Tr. 377-380, App. B-6, 7). But the impression created by Paliatto's testimony was ineradicable, the judge said (Tr. 381-82, App. B-8). And, as counsel for the corporate defendant pointed out, the Government had represented that Paliatto, who was the Government man actually in charge of the testing which was claimed to have been falsified, would be recalled later with respect to the fraud claimed (Tr. 383-84, App. B-9). For this reason, the judge had ruled that defense counsel should refrain from cross-examining Paliatto as to the fraud until later in the case (Tr. 30).

The Government rejected the trial judge's suggestion and the examination of Paliatto continued, with still further confusion and conflict.

After a third witness testified briefly, the Government, on the seventh day of the trial, called its fourth witness, Robert Rosenholm. Rosenholm had been named as a co-conspirator, but had not been indicted. He testified that he had been the company's "final inspector" of radiosondes. Like Paliatto, his testimony was, at least in part, self-contradictory (*Compare* Tr. 667-671 *with* 672-673).

On the afternoon of that day, while still on direct examination, Rosenholm was asked about a meeting at which the personnel manager of the plant and an attorney for the company had been present (Tr. 680 *et seq.*). He testified that this meeting had taken place in 1958, and that he wasn't sure of the month, but thought it was February (Tr. 681).

When objection was made on the ground of attorney-client privilege, the Assistant United States Attorney explained at a bench conference that the Government's theory was that, as a result of this conference, the attorney, as an agent of the company, had been apprised as to what was going on with respect to the testing of the radiosondes, and that no steps were taken by the company to remedy the situation. Moreover, he said, he would also show through

other witnesses that after he had been informed of "what was going on" the attorney attempted on behalf of the company to conceal it (Tr. 689-690). The judge then recessed the trial to permit the Government to prepare a foundation for this testimony.

When the trial resumed on September 20 Rosenholm was again asked to give his recollection of the date when the conversation with the attorney occurred. At this time he gave the date of the conversation as September 1957 (Tr. 693).

On cross-examination, Rosenholm, after first saying that he couldn't recall what had taken place an hour and a half before, admitted that he had changed the date as a result of the discussion with the Assistant United States Attorney (Tr. 705-07).

The date of the conference was highly significant. The indictment alleged that the conspiracy took place from September 1956 to November 1957. Thus, the testimony concerning the conversation with the company's attorney would be admissible only if it took place during that period.

The trial judge then excused the jury and the witness, and after expressing his belief that the prosecutor had violated an elementary rule (Tr. 708, App. B-10, 11), suggested that the situation might be such as to require him to respond to a motion (Tr. 709, App. B-12). The Assistant United States Attorney said that the actual time of the conference was not a point on which the case swung (Tr. 711, App. B-12). The court pointed out, however, that he had recessed the trial for the very purpose of permitting the Government to lay a proper foundation, if one could be laid, with regard to the admission of the testimony which the Government claimed would show that there was a continuous conspiracy involving the attorneys, the officers of the corporation, and other conspirators, as well as the defendants (Tr. 711-712, App. B-12, 13).

Counsel for the company then moved in the alternative for acquittal of the corporate defendant, or action by the court striking the testimony of the witness. Counsel for the individual defendants moved simply for a judgment of acquittal (Tr. 713, App. B-13, 14).

The trial court recalled the jury, and after absolving the United States Attorney and his Assistants of any intention of acting wrongfully, reviewed the situation as he saw it (Tr. 714, App. B-14). There had already been, he said, witnesses who showed a "lamentable lack of awareness or lack of capacity in connection with their testimonial obligations" (Tr. 715, App. B-15). He described the present witness as one who had shown "either lamentable lack of memory or an extraordinary power of inventiveness" in connection with a previous portion of his testimony (Tr. 717, App. B-17). He then concluded:

> "With due regard for the principles of justice under law, I must bear in mind not only what may be correct, but what is fair. In our constitutional system, under our jurisprudence, many things which are true are not allowed to be shown. Examples are a confession extorted by physical coercion; such a confession is not admissible although it may be perfectly correct and the defendant may be guilty. Likewise, information procured by an unlawful search and seizure may be perfectly true and the defendant may be guilty; nonetheless it is well settled that no conviction can be based lawfully upon information unconstitutionally procured by an unreasonable search or seizure.
>
> "These principles illustrate the sensitivity of American courts to fair play in connection with every aspect of the criminal law. It is not the duty of a court to see that every guilty man is punished. It is the duty of a court to see that every man gets a fair trial. The highest public interest is not the punishment of the wicked, but the establishment and maintenance of justice under law.

"Bearing in mind these principles, and responding to the motions of acquittal made by counsel for the individual defendants and the corporate defendant, I direct you at this stage to return the verdicts of acquittal with respect to each of the individuals and with respect to the corporation.

* * * *

"The COURT. The defendants will stand. [The defendants complied.] You have been acquitted by direction of the Court and by the Court. Your bail is terminated. You are free." (Tr. 717-18, App. B-17).

On September 21, 1960, the following judgment was entered on the docket:

"The Defendants, Standard Coil Products Co., Inc., Fong Foo, and Robert Knupp, having been set to a bar to be tried by a jury for the offenses of concealment of material facts and conspiring to conceal material facts in a matter within the jurisdiction of an agency of the United States in violation of 18 U.S.C. § 1001 and § 371 as charged in 9 counts, and

On September 20, 1960 upon the allowance of motions for acquittal made on behalf of each defendant, it is

ORDERED that each defendant be, and hereby is, acquitted of the offenses charges, and it is

FURTHER ORDERED that each defendant be, and hereby is discharged." (R. 50).

On September 28, 1960, the Government filed, with the District Court, a motion to vacate the judgment of acquittal and for reassignment for trial. In that motion, the Government urged (1) that the court had no authority to acquit and discharge the defendants until the evidence to be presented by the Government was closed, and that the judgment which had been entered was therefore void, (2) that the legal effect of the order, given its maximum

possible scope, "amounted to no more than the granting a motion for mistrial," and (3) that the grounds upon which the court relied were insufficient even to justify a mistrial. (R. 52). The motion was denied.

The Court of Appeals

The Government then filed a petition for a writ of mandamus in the Court of Appeals for the First Circuit. (R. 3). The petition set forth the grounds which had been urged in the District Court and prayed that the judgment of acquittal be vacated and the case be reassigned for trial. The defendants were permitted to intervene. (R. 55, 56, 58). The Court, on February 2, 1961, issued its opinion and the writ which the Government had requested. Although not requested to do so, it directed that the case be reassigned by the District Court for trial before another judge.

The majority opinion, per Woodbury, Chief Judge, recited in detail the circumstances of the trial. It concluded that it was not clear on the record whether the trial judge directed acquittal because he thought the testimony produced by the Government was not entitled to belief, or because he thought the action of the Assistant United States Attorney deprived the defendants of their rights. In either case, it held, his action was not only erroneous but "beyond his jurisdiction." (App. A-7).

As to the first possible ground, the Court was extremely critical of the trial judge. Although acknowledging that the testimony of the two principal witnesses "was certainly confused and conflicting," it concluded that the confusion and conflicts were, at least in part, generated by the questions asked by the trial judge. The witness' memories, the Court of Appeals agreed, "were not entirely reliable" and "they were not masters of the English language," but the trial judge was required to accept the witnesses as they were and should not have engaged in sharp, persistent ques-

tioning which only succeeded in further confusing them and disrupting the Government's case. (App. A-7, 8).

As to the second possible ground for the trial court's action, the Court of Appeals saw no conceivable basis for it. The Court conceded, although it specifically did not decide, that a judgment of acquittal "might be warranted in the event that deliberate misconduct of Government counsel is so outrageous as not only to render the trial in progress unfair but also to make a fair trial in the future impossible." (App. A-10, n. 5). It concluded, however, that the Assistant United States Attorney was not guilty of any misconduct or impropriety, and even if he had been the most the defendants would be entitled to in this case would be an order of mistrial. (App. A-10).

Having determined that the trial judge had erred, the court then turned to the question of whether it had power to correct the error. It conceded that, in view of the inability of the Government to appeal, error by the trial court in exercising its powers was not reviewable. The only possible basis for action was exercise by the trial judge of a power he did not possess. The trial court clearly had power to order an acquittal, under Rule 29(a) of the Federal Rules of Criminal Procedure, after the Government had closed its case. And the Government conceded (although the Court of Appeals did not decide), that such an order might be entered before the close of the Government's case if it were clear that, irrespective of the evidence to be produced later, what had already transpired made a conviction impossible. This was not the situation here, the Court of Appeals concluded, and therefore it did not have to decide whether under any circumstances a trial judge had power to enter a judgment of acquittal prior to the close of the Government's case. (App. A-11, 12).

The Court of Appeals proceeded to conclude, nevertheless, that under the circumstances of the present case the Court had no power to enter a judgment of acquittal

and that mandamus was a proper remedy to correct the purported exercise of that power. The court based this conclusion on two cases, *Ex Parte United States*, 242 U.S. 27 (1916), and *Ex Parte United States*, 287 U.S. 241 (1932). In the first case, which the court conceded was not in point, this Court had held that a district judge had no power to suspend a mandatory sentence, and that mandamus would lie to require the judge to vacate the order of suspension. Primarily relied upon by the Court of Appeals was the observation by this Court, in that case, that if the legislative command fixing a specific punishment could be set aside it would follow that a trial judge could refuse to treat as criminal an act which the legislature had so designated. (App. A-12).

More nearly in point, the Court of Appeals said, was the second case entitled *Ex Parte United States*. In that case this Court had issued a writ of mandamus directing a district judge to issue a bench warrant which he had refused to do despite the fact that an indictment had been returned by a properly constituted grand jury. That case, the Court of Appeals said, established that the writ of mandamus was available in aid of its appellate jurisdiction and established "the necessity for issuing the writ" to confine trial judges within their jurisdictional limits. (App. A-13). Then arguing by analogy, the court concluded that if a trial judge does not have the power to prevent the arrest of one properly accused of crime, or to refuse without valid reason to try a criminal charge, it followed that a trial judge had no power "arbitrarily to halt the trial of the accused when the Government has only begun to present its evidence of guilty. "We see no difference in principle between blocking a criminal trial at the threshold and blocking it when the Government has barely had a chance to put its toe in the door." (App. A-15).

Having thus decided that it had the power to set aside the judgment of acquittal, the court then addressed itself

to the question of double jeopardy. It conceded that it would be pointless to issue the writ of mandamus if the plea of *autrefois acquit* would be available on a second trial. But, it concluded, since the trial judge had no power to enter a judgment of acquittal there would be no basis for a claim of double jeopardy. (App. A-15, 16). (The difference, for double jeopardy purposes, between a first trial blocked "at the threshold" and one blocked after the Government had "put its toe in the door" was not discussed by the court.)

Judge Aldrich, although concurring in the result, differed sharply from the reasoning set forth in the majority opinion. Unlike the majority, Judge Aldrich affirmatively held that a trial court did have authority to enter a judgment of acquittal at any stage at which a fatal deficiency in the Government's evidence appeared. That being so, he concluded, and the decision of the trial judge not being reviewable, it would follow that a judgment of acquittal, no matter how erroneous, on the basis of the trial judge's determination that there was a fatal deficiency in the Government's case could not be vacated by way of mandamus. (App. A-18).

The considerations were different, Judge Aldrich argued, with respect to the claim of misconduct by Government counsel. True, the trial court clearly had the power to determine that the conduct of counsel was improper, and the power so to determine necessarily included the power to determine erroneously.

But Judge Aldrich concluded that "what corrective steps the court should take after its determination of a procedural error is a separate question." (App. A-18). Even assuming that the prosecutor had violated a rule of conduct in speaking to the witness, Judge Aldrich held that this misconduct did not justify an acquittal because it was "anything but deliberate," and it was not prejudicial to the defendants. Since the date was "a preliminary matter, its present effect . . . upon the trial was nil. Its future

effect was entirely in the control of the court, who could exclude any further evidence relating to this as yet undisclosed conference." (App. A-20, 21). Therefore Judge Aldrich concluded:

> "Under these circumstances I do not think that the court had any more power to order an acquittal than it would have had on the basis of some rule of thumb that more than three Government questions, asked in good faith be regarded by the court as irrelevant, had undoubtedly delayed the trial." (App. A-21).

Under Judge Aldrich's view, it was critical to determine whether the trial judge had entered the judgment on the basis of his conclusion concerning the evidence or on his view as to Government counsel's misconduct. Concluding that the record showed that the judge had acted because of his belief, whether erroneous or not, that the Assistant United States Attorney had conducted himself improperly, he concurred in the conclusion of the court that the judgment of acquittal was beyond the trial judge's power, that it should be set aside, and that the defendants should be tried again.

REASONS FOR GRANTING THE WRIT

In this case, for the first time in the history of federal jurisprudence, a court of appeals has set aside a judgment of acquittal entered in a criminal case by a competent tribunal and ordered a new trial.

The defendants, who were brought to trial once, and who were told that they were acquitted, are now once again "in jeopardy of life or limb." Obviously, this case bristles with new and important questions of federal law which should be decided by this Court.

1. The first question involved in this case is already pending before this Court in *Gori* v. *United States*, No. 486 (certiorari granted Dec. 12, 1960). In that case, a trial judge declared a mistrial on his own motion because of

what he considered to be misconduct on the part of the prosecuting attorney, and the question presented is whether the defendant's plea of double jeopardy on his second trial should have been sustained, since he neither requested nor consented to the mistrial in the first case. The position of the petitioner in that case is that a defendant who has once been put to trial before a jury cannot be tried again, before another jury, unless the first trial was terminated because of some compelling necessity, *cf.* ***Wade*** v. ***Hunter***, 336 U.S. 684 (1949) (termination of court martial trial because of overriding tactical considerations); ***Simmons*** v. ***United States***, 142 U.S. 148 (1891) (juror disqualified); ***Thompson*** v. ***United States***, 155 U.S. 271 (1894) (juror disqualified); ***Logan*** v. ***United States***, 144 U.S. 263 (1892) (hung jury); ***United States*** v. ***Perez***, 9 Wheat. 579 (1824) (hung jury), or unless the defendant himself moved for a mistrial. See dissenting opinion of Judge Waterman, 282 F.2d at 48.

In the present case, as in *Gori*, the defendants did not move for a new trial, and no compelling necessity existed for terminating the first one. Thus, even assuming that the court of appeals was correct in holding that the trial judge exceeded his power in granting a judgment of acquittal, the fact is that he did so and terminated the trial. The question thus arises whether the defendants can be tried again. The Court of Appeals ordered a new trial without even discussing this issue. It simply held, without much discussion, that the double jeopardy issue was resolved by its decision that the acquittal was a "nullity." This is plainly not a sufficient answer to the *Gori* problem, which arises even if it is assumed that the acquittal was void, merely because the original trial has been terminated, and the original jury discharged.

In the present case, unlike *Gori*, the trial judge did not act entirely on his own, but invited the defendants to make a motion. The significant fact, however, is that here, as in *Gori*, defendants did not move for or consent to a new trial.

On the contrary, if the judge had denied defendants' motion for acquittal, they would undoubtedly have elected to continue the trial, which from their point of view was developing quite favorably. This is particularly clear since the trial judge had unequivocally expressed his view that the jury could not possibly bring in a verdict of guilty, and had plainly indicated that if the jury would convict, he would probably set the verdict aside. (Tr. 377, App. B-5). It is also significant that counsel for the corporate defendant moved alternatively for an acquittal or to strike the testimony of the witness, but not for a mistrial. (Tr. 713, App. B-13, 14).

To suggest, therefore, as the Government did in the court below, that defendants consented to a new trial by moving for an acquittal is obviously to distort the concept of "consent" beyond all recognition. Indeed, there is less ground for finding any implied consent in this case than in *Gori*, since in *Gori* the defendant simply did nothing, while here the defendants moved, but *not* for a mistrial.

It is therefore plain that if *Gori* is to be reversed in this Court, then the present decision must be reversed. But, as we show below, there are additional questions presented in this case, the answers to which will not be provided by a decision in *Gori*.

These questions all relate, however, to the proper interpretation and application of the constitutional prohibition of double jeopardy and, we suggest, should be considered by the Court at the same time as it considers the narrow question posed in *Gori*.

The *Gori* case has now been set for argument, we have been informed, for the week of May 1, 1961. It is obviously impossible for this case to be ready for argument at that time. It is therefore respectfully suggested that if the Court decides to grant certiorari in this case, the *Gori* case should be put over until the 1961 term, and this case set down for argument consecutively with that case. Such a procedure,

counsel believe, will present to the Court a broader perspective on the problems involved, and will enhance the probability of consistent and sound decision.[3]

2. Perhaps the most important and fundamental question raised in this case is whether a court of appeals may, on a petition for a writ of mandamus or otherwise, review and set aside a judgment of acquittal, and order the defendant retried. As this Court stated in *Green* v. *United States*, 355 U.S. 184, 188 (1957):

> "... it has long been settled under the Fifth Amendment that a verdict of acquittal is final, ending a defendant's jeopardy, and even when 'not followed by any judgment is a bar to a subsequent prosecution for the same offense.' *United States* v. *Ball*, 163 U.S. 662, 671. Thus it is one of the elemental principles of our criminal law that the Government cannot secure a new trial by means of an appeal even though an acquittal may appear to be erroneous. *United States* v. *Ball*, *supra*; *Peters* v. *Hobby*, 349 U.S. 331, 344-345. Cf. *Kepner* v. *United States*, 195 U.S. 100; *United States* v. *Sanges*, 144 U.S. 310."

The dissenters in the *Green* case did not disagree with

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[3] The desirability of simultaneous consideration by this Court of this case and the *Gori* case is indicated by the inconsistent views as to the trial court's function expressed by the Government in the two cases. In the *Gori* case the thrust of the Government's position is that the authority of the judge over the conduct of the trial is not subject to review. As the Government asserted in its brief in opposition: "A trial judge must be the ultimate arbiter." (No. 486, Brief in Opposition, p. 7.) In this case, on the other hand, the Government urged in the Court of Appeals that it had a fundamental right to try its case and that action by the trial judge which arbitrarily shut it off from doing so could be reversed. The difference, obviously, is that in *Gori* the Government is seeking to sustain the trial judge's announced expectation when he declared a mistrial that the defendant would be tried again, while in this case the Government is trying to defeat the judgment of the trial judge that the defendants should go free.

the majority on this score. Indeed, the dissenting opinion, which was written by Mr. Justice Frankfurter, emphasized that the main object of the constitutional protection against double jeopardy was to prohibit a new trial after an acquittal, and on that basis differed with the majority as to the impact of the rule in a situation where a defendant appeals from a conviction. Referring to the original discussions in the House of Representatives on this portion of the Bill of Rights, Mr. Justice Frankfurter pointed out that it was agreed "that although *of course there could be no second trial following an acquittal*, the prohibition should not extend to a second trial when a conviction has been set aside." 355 U.S. at 202 (emphasis added). See also *Umbriaco* v. *United States*, 258 F.2d 625, 626 (9th Cir. 1958), in which the court held:

> "an appeal from a judgment of the trial court acquitting a defendant because of insufficiency of the evidence has never been permitted in the Federal Courts. It seemed so elementary that we are surprised to find such a right asserted in this case."

The court of appeals in the present case was well aware of the ancient doctrine that even erroneous judgments of acquittal are final and unreviewable, but ruled that an exception exists when the entry of a judgment of acquittal is not only "erroneous" but beyond the "power" or "jurisdiction" of the trial court. Is this entirely novel limitation on the previously absolute rule that judgments of acquittal by a competent tribunal are final consistent with the constitutional protection against double jeopardy?.

The court of appeals simply assumed, without much discussion, that there is no difference between setting aside a judgment of acquittal and setting aside any other order which was beyond the power of the district judge, such as the suspension of a mandatory sentence, *Ex Parte United States*, 242 U.S. 27 (1916), or the refusal to issue a bench warrant, *Ex Parte United States*, 287 U.S. 241 (1932). In

neither of these cases, however, was there any problem of double jeopardy involved, since in one case the defendant had been convicted (or, as it happened, had pleaded guilty), and in the other the defendant had not yet been brought to trial. There was thus no constitutional impediment to appellate review, by way of mandamus or otherwise, in either of those cases.

The present case, on the other hand, presents a very real constitutional problem. Whenever a motion for a judgment of acquittal is made, the trial judge must determine, along with all other questions, whether in the particular situation presented he has the "power" to grant the judgment. This is a question of law, like any other. What the Court of Appeals has held in this case is that the judge's determination of that particular question is subject to review—and if the appellate court disagrees with the judge, the defendants may be retried—although the judge's resolution of any other question of law must be final, regardless how erroneous it might have been. Whether that decision was right or wrong, it represents such an enormous modification of the principle that there can be no appellate review of a judgment of acquittal that it should be reviewed by this Court.

3. At least as important as the question of whether a court can examine a judgment of acquittal at all to determine whether the judge who entered it acted beyond his power, is the corollary question, also presented in this case, of how the court should make such a determination. In other words, what are the criteria by which a reviewing court is to decide, in this case or any other case, whether the trial judge did or did not have the power to enter a judgment of acquittal?

Suppose, for example, that a trial judge enters a judgment of acquittal on the ground that the prosecution did not prove a certain fact, which we will call X, which the trial judge holds to be an essential element of the crime. If the

court of appeals is of the view that X is not part of the crime which the prosecution must prove, may it then set aside the acquittal as having been beyond the "power" of the district judge?

Obviously, the answer is no. To hold that all acquittals based on erroneous decisions of law are reviewable and reversable in a court of appeals would be to repeal entirely the protection against double jeopardy.

Thus, in our hypothetical case, even "if directing the verdict was wrong, it certainly was not beyond the jurisdiction of the court." *United States* v. *Weissman*, 266 U.S. 377, 379 (1924).

How then does one distinguish between erroneous judgments of acquittal and those which are beyond the power of the court? The court of appeals in this case has provided no satisfactory answer.

In its brief to the court of appeals, the Government urged that some limitation on the power to grant acquittals must exist, and some remedy must be available to the Government to enforce that limitation. Otherwise, argued the Government, a district judge might acquit a defendant on the ground that he is a close friend of the judge. This, the Government argued, is certainly beyond the judge's power.

The argument is not lacking in appeal, but upon analysis, it presents great difficulties. Is there really a difference in kind, or only one of degree, between an erroneous holding that X is an essential element of a crime and a holding that being a friend of the judge is a defense to the crime? We find it difficult to articulate a distinction, unless it be based on the good faith of the judge. Perhaps in the "friend of the judge" case that test is relatively easy to apply, but how is it to be applied in real cases—and in this case?

Putting aside the question of the judge's honesty, the cases can only be distinguished by saying that one is merely error, while the other is outrageous error. That, apparently, was the basis for the court of appeals' decision in this case.

It held, in effect, that a trial judge has the power to make errors, but not errors which a reviewing court considers outrageous.

Thus, the court of appeals specifically stated that it was not holding that the entry of a judgment of acquittal prior to the close of the prosecution's case, on the ground of insufficient evidence, is always beyond the power of the trial judge. Indeed, the court pointed out that the Government had conceded that "judgment of acquittal might properly be entered in some situations even before the close of the Government's case." (App. A-11). Yet the court held that the judgment of acquittal in this case was beyond the judge's power because it was granted "on evidence showing no defense and long before the Government had had an opportunity to show whether or not it had a case. . . ." (App. A-12).

Similarly, the court did not hold that misconduct of the prosecutor can never be "so outrageous as not only to render the trial in progress unfair but also to make a fair trial in the future impossible." (App. A-10 n. 5). Rather, it held only that in this case "the Assistant United States Attorney was not guilty of misconduct or impropriety, and even if he had been it would seem that the most the defendants would be entitled to would be an order of mistrial." (App. A-10).

In short, the court of appeals did not say that the judge can never enter a judgment of acquittal on either of the grounds on which the trial judge relied, but held simply that in this case the circumstances did not call for such action. It would seem to follow that if the court of appeals could set aside the judgment of acquittal here, it can do so whenever it feels that the trial judge not only erred, but erred outrageously.

Judge Aldrich, who wrote a separate concurring opinion, seemed aware of this difficulty. He reasoned that if a

trial judge finds, prior to the close of the Government's case, that the evidence will not be sufficient to support a conviction, then the judge surely could grant an acquittal. That being so, he concluded, an appellate court could not review such a determination, no matter how erroneous it might appear. However, Judge Aldrich took the view that the acquittal in this case was based not on the insufficiency of the evidence, but merely on the alleged misconduct of the prosecutor. While the court of appeals could not reverse the trial judge on the question of whether the prosecutor's conduct was improper, it could set aside the acquittal if it concluded that the prosecutor's action, even if improper, was not prejudicial. On this basis, Judge Aldrich concurred in the result reached by the majority.

Obviously, the scope of review which Judge Aldrich would permit is somewhat different from that permitted under the majority opinion. His approach, however, presents other problems. How does one determine the basis on which the trial court granted an acquittal? Where there is an ambiguity, as apparently the majority felt there was here, does the Government or the defendant get the benefit of the doubt? Are criminal defendants henceforth going to be required to prove to a court of appeals that their acquittal was based on proper grounds to avoid being retried? What would happen if the judge merely granted a motion for acquittal, without comment or explanation?

Plainly, the majority and concurring opinions in the court of appeals are in a large measure in conflict with each other, and both leave major questions unanswered. The court of appeals has thus opened the way for other courts to review judgments of acquittal, without establishing clearly the limitations of such review. This Court should not allow such a situation to continue, where basic constitutional rights are at stake. The defendants in this case, as well as defendants in other cases which will inevitably arise, should be given the benefit of the judgment of this Court on the

important questions involved here before they are put in jeopardy a second time.

4. Assuming that the court of appeals properly held that it could review a judgment of acquittal on a petition for mandamus to determine whether the trial judge had exceeded his power, and assuming that some satisfactory criteria defining the power of the trial judge to grant such a judgment either exist or can be devised, the question arises whether the trial judge in fact exceeded his power in the circumstances of this case. This question, in itself, merits the consideration of this Court.

This case is not one where a trial judge wilfully abused his judicial office by granting an acquittal for some corrupt or irresponsible reason, although even such a case would not be free of difficulties, as we have seen. In the present case a conscientious judge, with the highest reputation for competence and integrity, concluded after many days of trial that in the interest of justice the defendants should be acquitted. An equally respected court of appeals held otherwise. This, in itself, indicates both the importance and the difficulty of the problem.

We are met at the threshold with the question whether, in any circumstances, the trial judge can acquit before the prosecution has rested. Rule 29 of the Federal Rules of Criminal Procedure does not in terms authorize such action. The majority in the court of appeals found it unnecessary to face the issue. The Government conceded, and Judge Aldrich held, that in some circumstances, at least, a trial judge may acquit at that stage, but that no such action was justified in this case.

Not unrelated to the matter of timing is the question whether a trial judge has broad power to grant a judgment of acquittal when he feels that justice so requires, or whether the power to acquit exists only in certain specific circumstances. Both of the opinions in the court of appeals seem to imply that the principal remedy available to defendants

who have not received a fair trial is the mistrial (a remedy which, incidentally, is not expressly provided for at all in the Federal Rules of Criminal Procedure), and that the judge cannot acquit the defendants simply on the ground that the prosecutor has not tried them fairly. This view appears to conflict with the view of the Ninth Circuit that

> "To prevent possible prejudice on trial beyond the general atmosphere of impartiality which traditionally pervades the courtroom, trial judges have wide discretion to methods of control. Among these are direction of mistrial, order to the jury to return verdict of acquittal and grant of new trial.
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> . . . from none of these enumerated orders, made after empanelment of the jury, could the prosecution have review." *United States* v. *Heath*, 260 F.2d 623, 626-27 (9th Cir. 1958).

There can be no dispute that, in the words of the trial judge,

> "It is not the duty of a court to see that every guilty man is punished. It is the duty of a court to see that every man gets a fair trial. The highest public interest is not the punishment of the wicked, but the establishment and maintenance of justice under law."

Can this function be properly fulfilled if the trial judge lacks the power to acquit after two key witnesses have shown "a lamentable lack of awareness or lack of capacity in connection with their testimonial obligations" and the prosecutor has engaged in what the judge considers to be serious and prejudicial misconduct? If we were to assume that this trial had taken place after two, three, or four prior mistrials, would the judge still lack the power to acquit? Would ordering still another trial then be the only way in which the trial judge could assure "the establishment and maintenance of justice under law?"

If the answer to these questions is yes, as the court of appeals seems to say, then perhaps the trial judge was in error in assuming that the primary duty of a court is "to see that every man gets a fair trial," not "to see that every guilty man is punished." But whether the trial judge or the court of appeals was correct, the question whether a judge has the power to grant a judgment of acquittal, even before the prosecution has finished its case, when he feels, all things considered, that the interest of justice so requires, is itself an important question of federal law deserving of review in this Court.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for certiorari should be granted, that the argument in No. 486 should be postponed, and that the two cases should be set for argument consecutively.

Respectfully submitted,

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APPENDIX A

United States Court of Appeals
For the First Circuit

No. 5755, Original

In the Matter of
UNITED STATES OF AMERICA,
PETITIONER

PETITION FOR WRIT OF MANDAMUS.

Before WOODBURY, *Chief Judge*, and HARTIGAN and ALDRICH, *Circuit Judges*.

Elliot L. Richardson, United States Attorney, with whom *George C. Caner, Jr.*, and *Joseph S. Mitchell, Jr.*, Assistant U. S. Attorneys, were on brief, for petitioner.

James D. St. Clair, with whom *Blair L. Perry* and *Hale and Door* were on brief, for Standard Coil Products Co., Inc., intervenor.

Samuel E. Angoff, with whom *Grant, Angoff, Goldman & Manning* was on brief, for Robert Knupp and Fong Foo, intervenors.

OPINION OF THE COURT

February 2, 1961

WOODBURY, *Chief Judge*. This is a petition by the United States for a writ of mandamus directing a judge of the United States District Court for the District of Massachusetts, and also that District Court, to vacate a "Judgment of Acquittal" entered by the judge in a criminal case, to reassign the case for trial, and for such other and further relief as this court may deem just.

A grand jury in the court below returned an indictment in nine counts against Standard Coil Products Co., Inc., an

Illinois corporation, which at the time covered by the indictment had a manufacturing plant in North Dighton, Massachusetts, and two individuals then employed by it at that plant, one as the Chief of its Quality Control Department and the other at first as a supervisor and later as the foreman in charge of the production of certain electronic instruments to be described presently, charging all three with the offenses of concealing material facts and conspiring to conceal material facts in a matter within the jurisdiction of an agency of the United States in violation of Title 18 U.S.C. § 1001 and § 371. More specifically the charges were that from September 1956 to November 1957 the accused had knowingly and wilfully falsified, and conspired between themselves and with others to falsify, tests of radiosondes [1] being manufactured at the time in the plant at North Dighton under two contracts entered into by Standard Coil Products Co., Inc., with the Army Signal Supply Agency.

Motions to dismiss the indictment were denied and the defendants were set to the bar to be tried by jury on their pleas of not guilty.

One of the two Assistant United States Attorneys who represented the Government at the trial made an opening statement to the jury in which he explained the general nature of the charges laid in the indictment and the evidence he proposed to introduce saying that the presentation of the Government's case would fall naturally into two parts, the first part consisting of evidence explanatory of the instruments and of the procedures for testing them and the second part consisting of evidence of deliberate and conniving falsification of the tests run on the instru-

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[1] These are electronic devices for furnishing weather data designed to be dropped from airplanes in remote places and while floating to earth by parachute to transmit continuous radio signals in Morse Code indicating the temperature, pressure and humidity of the air through which they pass.

ments by the defendants. In carrying out this program the Assistant United States Attorney in charge at the trial called a witness through whom he introduced the contracts and related documents under which the radiosondes were manufactured by Standard Coil Products Co., Inc. He then called the "Quality Assurance Representative" of the Army Signal Supply Agency who had been stationed at the corporate defendant's North Dighton plant during the time involved for the purpose of supervising the inspection of radiosondes by plant personnel. An examination of the record shows that while this witness was on direct examination he was asked fully as many questions by the judge as by the Assistant United States Attorney. Moreover, the judge on several occasions, both during direct and cross-examination, ridiculed the witness with respect to his use of words, repeatedly corrected his grammar, and many times admonished him to remember that he should be careful in his statements since he was testifying in a criminal case. As the examination of this witness proceeded the questions and sometimes sharp comments of the judge clearly show that he considered the witness's testimony unworthy of belief.

The Assistant United States Attorney next called a witness who briefly identified certain charts to be used by subsequent witnesses as "chalks" and then called a witness to the stand who identified himself as having been the "final inspector of radiosondes" employed by the corporate defendant at its North Dighton plant during the period covered by the indictment.

The direct examination of this witness closely followed the pattern of the direct examination of the government inspector. Toward the end of a day, while still on direct examination, this witness was asked for the date of a conference he had been invited to attend at the plant office with counsel for the corporate defendant. He said at first that he did not remember the date but when pressed for

his best recollection he said that he thought the meeting was early in 1958, he believed in February but was not sure. That is to say, he put the date of the conference after the period covered by the indictment. The next morning, while still on direct examination, the witness was again asked if he was certain of the date of the conference and he again said he was not. On being asked once more for his best recollection he said, "Approximately September 1957." The judge then asked the witness if he had talked with government counsel while testifying in the case, and the witness saying that he had, the judge remarked that in a criminal case that was not "correct."

A little while later, on cross-examination by counsel for the corporate defendant, the witness admitted that he had changed his testimony as to the date of the meeting as a result of a conference with one of the Assistant United States Attorneys during the preceding over-night recess. The judge then excused the jury and asked the Assistant United States Attorney involved if he wished to make any statement "as a matter of personal privilege." The latter answered that he was unaware of any reason why he should not talk with his own witness during a recess called in the course of the witness' direct examination and expressed astonishment that the judge should think that there was any impropriety in his having done so. The judge then ordered the witness to leave the courtroom and the Assistant United States Attorney, again having expressed ignorance of any impropriety in what he had done, the judge said, "You will very soon learn," and addressed the Assistant United States Attorney as follows:

> "You were here and you knew he was on the stand. You knew there was a recess. You know the principle that a witness must be examined in public. You know that, without suggesting for a moment that you offered any improper inducement, tampering with a witness is one of the most dangerous things in connection with

> a case, and particularly a criminal case, that a person should be left entirely alone during the course of his testimony. You must know that elementary fact and elementary rule."

During further colloquy in the same vein the judge said that he did not mean that counsel for the Government were "personally deliberately" doing something they "knew to be wicked," and that he was not "proposing to take any disciplinary action" against them but was only interested in finding out whether the "situation" was one in which he "must respond to a motion." After more colloquy in the course of which the judge again suggested that the "situation" might require him to act "in response to a motion," counsel for each defendant moved orally for judgment of acquittal. Counsel for the Government strenuously opposed these motions on the ground that the witnesses so far heard were not vital to the case but were primarily intended only to lay the basis for concrete testimony of guilt to follow and that there were many government witnesses in attendance in the courtroom yet to be heard for whose credibility he was ready to vouch. He suggested that the most that should be done would be to strike the testimony of the witness under examination.

At the conclusion of the Assistant United States Attorney's remarks the judge recalled the jury, ordered the witness back to the stand, and opened a statement to the jury as follows:

> "Mr. Foreman and Members of the Jury, before I say anything else, let me make it absolutely clear that counsel for the defendants as well as the Court are persuaded that neither the United States Attorney[2] nor either of his assistants consciously or deliberately violated any canon with which they were familiar.

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[2] The United States Attorney himself had joined his two assistants in the courtroom during the course of this trial.

> They were acting subjectively in good faith, and I do not mean at any stage of the remarks I am about to make to criticise them in the sense that I believe that they were conscious wrongdoers."

Following this the judge implied that he considered the Assistant United States Attorney's conference with the witness during recess a serious infringement of the defendants' civil rights and that he regarded the testimony of the two principal witnesses so far produced by the Government to be wholly unworthy of belief, saying that both showed on the stand "a lamentable lack of awareness or lack of capacity in connection with their testimonial obligations" and that the witness then on the stand "has shown either lamentable lack of memory or an extraordinary power of inventiveness."

At the conclusion of his remarks the judge said to the jury that acting in response to the motions for acquittal made by counsel for the individual defendants and the corporate defendant, "I direct you at this stage to return verdicts of acquittal with respect to each of the individuals and with respect to the corporation." The judge then directed the defendants to stand up and announced, "You have been acquitted by direction of the Court and by the Court. Your bail is terminated. You are free." [3]

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[3] On the next day judgment was entered as follows:

> "The Defendants, Standard Coil Products Co., Inc., Fong Foo, and Robert Knupp, having been set to the bar to be tried by a jury for the offenses of concealment of material facts and conspiring to conceal material facts in a matter within the jurisdiction of an agency of the United States in violation of 18 U.S.C. 1001 and 371 as charged in 9 counts, and
>
> On September 20, 1960, upon the allowance of motions for acquittal made on behalf of each defendant, it is
>
> ORDERED that each defendant be, and hereby is, acquitted of the offsenses charged, and it is
>
> FURTHER ORDERED that each defendant be, and hereby is, discharged."

We cannot be sure whether the judge directed acquittal of the defendants because he thought the testimony of two of the four witnesses put on by the United States at the outset of the trial was not entitled to belief or because he thought the action of the Assistant United States Attorney in talking with a government witness during a recess called while the witness was on direct examination deprived the defendants of some basic civil right. But whether the judge acted as he did for one reason or for the other, or for both reasons in combination, we think his action was not only plainly erroneous but beyond his jurisdiction.

The testimony of the two principal witnesses to whom we have specifically referred was certainly confused and conflicting. But, although to an appellate court the record of a trial may be "cold," it can nevertheless be clear; and it is clear from the record before us that the confusion and conflicts in these witnesses' testimony was due in no minor part to the trial judge's persistent, sharp and sometimes caustic cross-examination throughout their direct examination.

It is evident that the memories of the Government's witnesses were not entirely reliable, particularly as to details and it is also evident that they were not masters of the English language. But as every lawyer with trial experience knows, the witness whose memory is clear and sharp, who in court is neither over-awed nor cockily over-confident, and who has the capacity clearly to understand the questions asked and the command of language to answer briefly and accurately is indeed a *rara avis*. Cases can only be tried on the testimony of those who have knowledge of the issues, whoever they may happen to be, and all too often, indeed usually, witnesses, coming as they ordinarily do from the body of the general public, neither think nor speak with the clarity and precision of academicians. For the most part witnesses with only average education and intellectual capacity are the tools with which trial counsel

must work as best they can. Moreover, every occupation has its own vernacular. Sailors, doctors, railroad men, engineers, not to omit lawyers, and others too numerous to mention, more or less unconsciously slip into the vocabularies of their callings. Naturally witnesses can and should be required to explain the words they use. It is hardly necessary, however, to do so with ridicule or caustic criticism, or repeatedly to check a witness' use of words in reasonably common use by reference to the Oxford English Dictionary, or to require strict adherence to the rules of grammar. The bench is not an appropriate rostrum from which to teach the niceties of English grammar and usage.

It may well be that solicitude for the essential rights of an accused requires the trial judge to cross-examine government witnesses when an accused with no capacity to protect his rights insists upon conducting his own defense or when an accused is represented by wholly inadequate counsel. No such situation is before us here, however, for the accused were skillfully represented by able and experienced trial counsel who were very well qualified to preserve their client's every interest. We think it would have been far better had performance of that function been left to counsel. Trial judges must not forget that questions from the bench naturally and properly fall with great impact upon ordinary witnesses and that counsel are reluctant to object to questions asked by a judge for fear of giving offense. There can be no even give and take in court between the judge and counsel for counsel on the floor do not stand on even terms with the judge on the bench.

While performance by the trial judge of his function, indeed duty, to see that the truth is elicited ordinarily requires clarifying questions from the bench, and maybe on occasion sharp warnings, it is not his function or duty to take the conduct of a case away from counsel. Counsel, as in this case, who sees the examination of his witnesses taken over by the judge and led into matters the witnesses

were not intended to cover in their testimony and so opened for cross-examination as to those matters by the other side, finds himself in a most difficult and embarrassing situation. In the first place, it is a delicate matter about which counsel think twice to object to any question asked by a judge. In the second place, if counsel objects to judge's question on the ground that it leads the witness into matters he was not offered to testify about, counsel runs the risk, exemplified in this case, of comment by the judge before the jury implying that he is seeking to cut off legitimate inquiry. On the other hand, if counsel does not object he soon finds his witness floundering and displaying ignorance and, again as in this case, provoking critical comments by the judge either on the witness' intelligence or on counsel's failure to prepare his case.

We recognize that in the federal courts the trial judge is not relegated to the position of a mere moderator. He has the duty not only to make rulings of law but also to govern the trial to assure its proper conduct. *Quercia* v. *United States*, 289 U.S. 466, 469 (1933). Moreover upon his shoulders rests the duty to see that the trial is conducted with solicitude for the basic and essential rights of the accused. *Glasser* v. *United States*, 315 U.S. 60, 71 (1942). But when the trial judge assumes the role of counsel the adversary system breaks down into confusion worse confounded as the record in this case clearly shows.

This record provides a prime example of the consequences of over zealous participation in the examination of witnesses by the trial judge, for it is clear that the judge's sharp, persistent, sometimes almost badgering, questioning and caustic remarks first made the witnesses wary and over cautious and then confused them into inconsistencies, and in addition disrupted the orderly presentation of the Government's case according to the plan outlined to the jury by the Assistant United States Attorney by taking its witnesses into matters they were not offered

to cover in their testimony. Running cross-examination from the bench, particularly during a witness' direct examination, is an innovation in trial practice which definitely does not have the approval of this court.[4]

We are at a loss to understand the basis for the judge's criticism of the Assistant United States Attorney for talking with a Government witness during a recess. We are not aware of any rule of law, "elementary" or otherwise, or any canon of professional conduct forbidding the practice. Of course, as a matter of trial tactics, counsel ordinarily avoid talking with a witness during a recess called while the witness is on the stand so as not to provide opposing counsel with a point to argue to the jury. But tactics are one thing and rules of law and canons of ethics are quite another. There is nothing wrong that we know of in talking with a witness during intervals in his examination in court. Indeed in *Frazer* v. *United States*, 233 F. 2d 1, 2 (C.A. 9, 1956), counsel for the Government was commended for privately reminding a witness of a false statement in her testimony thereby causing her to change her testimony to conform to the truth.

The Assistant United States Attorney was not guilty of any misconduct or impropriety, and even if he had been it would seem that the most the defendants would be entitled to would be an order of mistrial.[5] *Berger* v. *United States*, 295 U.S. 78 (1935). Moreover, the judge should have allowed the jury to pass on the credibility of the Government's introductory witnesses and allowed the Government to proceed with the presentation of its concrete evidence

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[4] If cases are to be tried by the judge instead of by counsel, the rules of procedure will have to be drastically revised.

[5] Conceivably, although we have no occasion to decide and do not decide, a judgment of acquittal might be warranted in the event that deliberate misconduct of Government counsel is so outrageous as not only to render the trial in progress unfair but also to make a fair trial in the future impossible.

of the offenses charged. The question remains as to what, if anything, this court can and should do to correct the trial judge's error.

Certainly the judge's error was prejudicial to the United States. But the United States obviously cannot appeal. Nor may it resort to mandamus as a substitute for appeal. The writ is not available "to correct a mere error in the exercise of a conceded judicial power." *De Beers Consolidated Mines, Ltd.*, v. *United States*, 325 U.S. 212, 217 (1945). It is available however, to correct judicial action which is not mere error but usurpation of power, *id.* One of the writ's two traditional uses "both at common law and in the federal courts has been, in appropriate cases, to confine inferior courts to the exercise of their prescribed jurisdiction." *United States Alkali Export Ass'n, Inc.*, v. *United States*, 325 U.S. 196, 202 (1945). Therefore the distinction to be drawn is between an error in the exercise of a power conferred and an attempt to exercise a power not possessed.

There can be no doubt of the power of the court under Rule 29 (a) of the Federal Rules of Criminal Procedure to order the entry of judgment of acquittal, either on its own motion or on motion of a defendant, as to one or more of the offenses charged in an indictment or information "after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses." In spite of the clear wording of the Rule, perhaps, as the Government concedes, although again we do not need to decide and do not decide, judgment of acquittal might properly be entered in some situations even before the close of the Government's case, as for instance, when the Government's opening statement unmistakably shows that the evidence it proposes to introduce would not sustain a conviction, or when it produces evidence conclusively showing either that it has no case or that the accused has an iron-clad defense. But there is no suggestion of any

such situation here, for the judge abruptly terminated the Government's case by ordering the entry of a judgment of acquittal on evidence showing no defense and long before the Government had had an opportunity to show whether or not it had a case; and, moreover, he did so in ignorance of either the exact nature or the cogency of the specific evidence of guilt which Government's counsel said he had available and was ready to present.

Primarily on the basis of two cases to be cited and discussed presently, we think that under the circumstances of the case before us the judge had no power, that is to say, jurisdiction, to terminate the Government's presentation of its case in mid-course by entering judgment of acquittal and that the mandamus lies to correct the error.

In *Ex Parte United States,* 242 U.S. 27 (1916), the Court held that, practice in certain circuits including this one to the contrary notwithstanding, a district judge in the absence of statutory authority had no power permanently to suspend a mandatory minimum sentence of 5 years for bank fraud and that mandamus lay to require the judge to vacate his erroneous order of suspension.

In reaching this conclusion the Court adverted to the consequences of holding to the contrary, that is, of holding that an inherent judicial power could thwart a legislative determination of sentence saying:

> "[I]f it be that plain legislative command fixing a specific punishment for crime is subject to be permanently set aside by an implied judicial power upon considerations extraneous to the legality of the conviction, it would seem necessarily to follow that there could likewise be implied a discretionary authority to permanently refuse to try a criminal charge because of the conclusion that a particular act made criminal by law ought not to be treated as criminal. And thus it would come to pass that the possession by the judicial department of power to permanently refuse

to enforce a law would result in the destruction of the conceded powers of the other departments and hence leave no law to be enforced."

A later case of the same name, *Ex Parte United States*, 287 U.S. 241 (1932), is more nearly in point. In that case the Court issued its writ of mandamus ordering a district judge to issue a bench warrant, which he had refused to do in the purported exercise of his discretion, for the arrest of one under an indictment "fair on its face" returned by a properly constituted grand jury. The case cited is particularly significant in that it shows that issuance of mandamus by this court in the present case would be in aid of our appellate jurisdiction, and also shows the jurisdictional limits of a trial judge's powers in criminal cases and the necessity for issuing the writ to confine trial judges within those limits.

In the first place, since the Court in the case cited above was expressly exercising the original jurisdiction conferred upon it by § 262 of the Judicial Code (the forerunner of present § 1651 (a) of Title 28), we, as an intermediate appellate court, can safely rely upon it as direct authority for our issuance of the writ in aid of our appellate jurisdiction. See Chief Judge Magruder's discussion in *In Re Josephson*, 218 F.2d 174, 177-180 (C.A. 1, 1954). If, in spite of the fact that an accused may ultimately be found not guilty, the Supreme Court of the United States, in the exercise of its ultimate discretionary jurisdiction to review actions of the inferior federal courts by certiorari, has power in its discretion to issue mandamus to a federal district court ordering the arrest of one properly charged with crime by a grand jury, then this court, in the exercise of its direct appellate jurisdiction, must also have discretionary power to issue mandamus to require a district judge, or court, to permit the United States to at least present its evidence of guilt when an accused properly

charged with crime has been brought to trial. There is thus no need for us to consider whether authority to issue the writ in aid of our jurisdiction might also be found in *Roche* v. *Evaporated Milk Ass'n*, 319 U.S. 21 (1943), or *La Buy* v. *Howes Leather Co.*, 352 U.S. 249 (1957).

In the second place the considerations on which the Court relied in *Ex Parte United States*, 287 U.S. 241, 249-251 (1932), for its conclusion that the district judge did not have jurisdiction to deny the Government's petition for a bench warrant for the arrest of one properly charged with crime support our conclusion that the district judge in the situation before us did not have jurisdiction to prevent the United States from going on with the presentation of its evidence of guilt. We have specific reference to the statement on page 250 that a proper indictment returned by a properly constituted grand jury[6] "conclusively" determined the existence of probable cause for holding the accused to answer to a charge of crime and also to the statement on page 249 that the effect of the refusal of the district court to issue a warrant for the arrest of one charged in "an indictment fair upon its face and properly found and returned is equivalent to a denial of the absolute right of the government, as matters stand, to put the accused on trial. . . . The mere statement discloses the gravity and public importance of the question. It is obvious that if a like attitude should be taken by district courts generally, serious interference with the prosecution of persons indicted for criminal offenses might result."

These observations, and others we might quote from the same opinion and the cases cited therein, are pertinent here. If, under the circumstances disclosed by the record before us, a district judge for no good reason can halt the presentation of the Government's evidence in a criminal case and

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[6] We can say the same for the indictment in the case at bar. At least there is no suggestion to the contrary and motions to dismiss the indictment were denied by the district judge.

enter judgment of acquittal, the action of the grand jury in returning the indictment would be just as much flouted, and the Government fully as frustrated in the performance of its duty to prosecute persons regularly and properly charged with crime as though the judge at the outset had refused to issue a bench warrant for the arrest of the accused. The action of the trial judge in one situation falls as little short of a refusal to permit enforcement of the criminal law as in the other. See *id.* at page 250. Though the situations are different they are clearly comparable.

The industry of counsel and our own research has unearthed no case squarely in point. But if a trial judge does not have the power to prevent the arrest of anyone properly accused of crime, as held in the later case entitled *Ex Parte United States*, cited above, or to refuse for no valid reason ever to try a criminal charge as indicated in the earlier case of the same name, also cited above, it seems to us to follow that a trial judge has no power arbitrarily to halt the trial of an accused when the government has only begun to present its evidence of guilt. We see no difference in principle between blocking a criminal trial at the threshold and blocking it when the government has barely had a chance to put its toe in the door.

The question of double jeopardy remains for consideration.

Strictly speaking the defense of double jeopardy is not now before us. We can confidently anticipate, however, that the defense will be raised by the defendants by a plea of *autrefois acquit*, or former acquittal, when they are set to the bar to be tried again. Therefore, since issuance of mandamus, when within our power, is discretionary, and it would be pointless for us to issue the writ if it were a foregone conclusion that the plea of *autrefois acquit* would be good at another trial, it is appropriate here briefly to advert to the defense of double jeopardy. It will suffice for us to say that from our conclusion that the trial judge

had no power, that is to say no jurisdiction, to enter judgment of acquittal, it follows under principles too well established to require citation of authorities that the judgment is void—a nullity—and hence affords no basis for the defense of double jeopardy. See *Mitchell* v. *Youell*, 130 F.2d 880 (C.A. 4, 1942).

The United States in its application for mandamus has not specifically asked us to order that the case be reassigned for trial before another judge. Nevertheless we shall do so, for we do not see how a judge who has unnecessarily taken it upon himself to cross-examine witnesses not only extensively but also sharply can either listen to their testimony reflectively or weigh their testimony dispassionately.

Mandamus will issue directing that the judgment of acquittal entered in United States v. *Standard Coil Products Co., Inc., Fong Foo and Robert Knupp designated on the Criminal Docket of the United States District Court for the District of Massachusetts as CR. 60-6-W, be vacated and ordering that the above case be reassigned by that court for trial before another judge.*

ALDRICH, *Circuit Judge*, (concurring). If I agreed with the court that one could not be sure of the reason why the district court ordered the acquittal I would have to disagree with its conclusion on the issue of double jeopardy. Since the subject is of some general importance, I will state my reasons.

I cannot think that a court is "without power," that is, "without jurisdiction," [1] to order an acquittal in the midst of the government's case on the ground that evidence already introduced is so fatally defective that no jury could be allowed to convict. The court assumes, *arguendo*, that it may sometimes be appropriate for a district court to direct

[1] The court apparently uses "power" and "jurisdiction" interchangeably. Certainly there is no question here about the district court's jurisdiction over the case and over the defendants. Accordingly, I will hereafter use the term "power."

an acquittal prior to the closing of the government's case because of some evidentiary defect, but says it is unnecessary to decide. I do not think one can leave this matter hanging, but, rather, I believe its resolution to be all-important.

Not unnaturally, in view of the fact that the government has no general right of appeal, there is a paucity of authority with respect to the right of the court to acquit for evidentiary defects at any preliminary stage. In *United States* v. *Dietrich*, C.C.D.Neb., 1904, 126 Fed. 676, Circuit Judge (afterwards Mr. Justice) Van Devanter said, at pp. 677-78,

> "Where, by the opening statement for the prosecution in a criminal trial, and after full opportunity for the correction of any ambiguity, error, or omission in the statement, a fact is clearly and deliberately admitted which must necessarily prevent a conviction and require an acquittal, the court may, upon its motion or that of counsel, close the case by directing a verdict for the accused. The court has the same power to act upon such an admission that it would have to act upon the evidence if produced. It would be a waste of time to listen to evidence of other matters when at the outset a fact is clearly and deliberately admitted which must defeat the prosecution in the end."

I see no reason to say the court there erred in applying this well-recognized civil principle to a criminal proceeding. See *McGuire* v. *United States*, 8 Cir., 1945, 152 F. 2d 577, 580. In like manner, in *United States* v. *Maryland Co-operative Milk Producers, Inc.*, D.C.D.C., 1956, 145 F. Supp. 151, an acquittal was ordered when facts were stipulated during the course of the government's case which the court believed precluded any possibility of criminal liability. See also *United States* v. *Weissman*, 1924, 266 U.S. 377, 379.

In the absence of any contrary authority, it seems inherently reasonable to conclude that at whatever stage a fatal deficiency in the government's evidence irrevocably appears, the court is empowered to acquit.[2] Yet it must follow that if the court can make such a decision *in medias res* when its opinion of the damaging effect of particular facts is correct, it can equally do so when its interpretation is incorrect. If a court truly lacked jurisdiction, that would be one thing, but given power to decide, there must be power to decide erroneously. Therefore the question must be, was the nature of the ruling that the court made here so different in kind that it must be said that the court was entirely without the power to make it.

There can be no doubt that even if a court found no conceded fact, as in the *Maryland Cooperative* case, fatal to the government, but nevertheless was of the opinion that the government's evidence was so unreliable and vacillating[3] as to be utterly unworthy of belief, it could order an acquittal at the close of the government's case. The government could not appeal, no matter how erroneous the court's determination. I cannot think that a court is entirely without power to reach the same conclusion before the last witness has testified. It is not always necessary to eat the whole of an egg to know it is rotten. The fact that the court is obliged to put the defendant to the bar, *Ex parte United States*, 1932, 287 U.S. 241, seems a far cry from

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[2] There is some suggestion in the court's opinion that Fed. Rule of Crim. Procedure 29(a), 18 U.S.C., permitting the court to acquit at the close of the government's evidence and allowing the defendant to move at that time without resting, impliedly indicates that the court may not acquit at any earlier stage. The rule contains, however, no positive prohibition to that effect. I believe the rule merely recognizes a common practice, and encourages it by not restricting the right of the defendant to move. See 5 Moore, Federal Practice ¶50.01 [2] (2d ed. 1951).

[3] The district court here (wrongfully, I agree) asserted that the witnesses continually and fundamentally contradicted themselves.

saying that it cannot, in a bona fide attempt to weigh evidence introduced, conclude that what it holds to be a vital part thereof is so irretrievably bad that no jury could properly convict.[4]

Suppose here that instead of ordering an acquittal forthwith the court had stated that under the circumstances then disclosed all of the remaining evidence offered by the government must be excluded as irrelevant. Manifestly, the power to exclude evidence as irrelevant exists at all times. The government, perforce, would then have rested, and the court's power to acquit would have become absolute. In what way was the court's ruling (if the unreliability of the evidence was its reason for acquittal rather than government counsel's alleged misconduct) other than that evidence already introduced so fatally infected the case that all further evidence was irrelevant in the sense that it could not cure the defect? To say that this was done without sufficient consideration is not to say that it was done without power. I believe the court has been misled by the relative magnitude of the district court's error into confusing a difference in degree with a difference in kind.

However, I think that a different question is raised by the other possible reason for the acquittal, the conduct of the Assistant U. S. Attorney in speaking to his witness during the recess. Here the court's assumption, *arguendo*, (note 5) is that "a judgment of acquittal might be warranted in the event that deliberate misconduct of Government counsel is so outrageous as not only to render the trial in progress unfair but also to make a fair trial in the future impossible." I find it difficult to imagine circumstances warranting such an assumption. *Cf. Caldwell* v. *United States*, D.C. Cir., 1953, 205 F. 2d 879, 881 n. 11.

[4] Even accepting in full the government's suggestion that it is entitled to a trial by jury, such trial traditionally includes the right of the court to conclude that the evidence does not warrant submission. See *Patton* v. *United States*, 1929, 281 U.S. 276, 288.

cert. den., 349 U.S. 930. But in all events I agree with the court that it is totally inapplicable.

It must be conceded that it was within the power of the district court to determine, however erroneously, that the conduct of counsel was improper. But I do not think it follows automatically that the court had power to acquit for that same reason. "A criminal prosecution is more than a game in which the government may be checkmated and the game lost merely because its officers have not played according to rule." *Maguire* v. *United States*, 1927, 273 U.S. 95, 99. When a court acquits in the middle of the government's case because of what it believes to be an incurable defect in the evidence, it has made a judgment on the government's case as a whole. A ruling of misconduct, however, is only a judgment as to the procedure in the particular trial. What corrective steps the court should take after its determination of a procedural error is a separate question. To make the same assumption that the court makes in its opinion, that "deliberate," "outrageous" misconduct which would project its unfairness into a future trial would warrant an acquittal forthwith, does not advance the matter, because that is far from our case. The district court made it abundantly clear that the error, as it considered it, committed by the Assistant U. S. Attorney was based upon ignorance of the court's rule,[5] and was anything but deliberate. Nor was any question of prejudice to the defendants possibly involved. The only testimony which the witness had changed as a result of conferring with counsel was the date of a particular conference. The date was a preliminary matter. Nothing about the conference had been admitted in evidence. The present effect of this new testimony upon the trial was nil. Its

[5] An understandable ignorance, since twice before during the trial the court had expressly invited a government witness to confer with counsel during recess about his testimony, and in one instance to "rehearse it with counsel."

future effect was entirely in the control of the court, who could exclude any future evidence relating to this as yet undisclosed conference. Prejudice to the defendants was accordingly nonexistent.

Under these circumstances I do not think the court had any more power to order an acquittal than it would have had on the basis of some rule of thumb that more than three government questions, asked in good faith, but regarded by the court as irrelevant, had unduly delayed the trial.

While courts can do, and must be permitted to do, unwise and even foolish things, I think there must be some limit to naked, arbitrary power. As against a defendant's right to be free from double jeopardy, there is the interest of the public in the prosecution and conviction of criminals. See, *e.g.*, *Green* v. *United States*, 1957, 355 U.S. 184, 216-19 (Frankfurter, J., dissenting). In some instances this has been permitted to override what, strictly, is a second jeopardy, or at least an extended jeopardy. *Cf. Wade* v. *Hunter*, 1949, 336 U.S. 684, 688-90; cases collected in *United States* v. *Gori*, 2 Cir., 1960, 282 F. 2d 43, 48 (dissenting opinion), *cert. granted* 12/12/60. Whatever may be the correct philosophy of judicial power, I am unwilling to think that such a totally arbitrary act in the course of trial with no semblance of justification behind it,[6] should deprive the government of its day in court. This may be an exceptional ruling, but this is an exceptional case.

Since I think different consequences flow from the two suggested grounds of the district court's acquittal, it is essential to determine, if possible, which one was the actual basis of its action. With all respect, I do not share the court's expressed uncertainty. As soon as it appeared why

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[6] Unless one wanted to say it was to teach government counsel a lesson for not knowing the rules—which is scarcely a judicial function. It would be doubly inappropriate here in view of the court's prior instructions. See n. 5, *supra*.

the witness had changed his testimony the district court excused the jury and asked the Assistant U. S. Attorney, "As a matter of personal privilege do you want to make any statement?" The court stated that in talking to his witness counsel had violated an "elementary rule," and that it was "interested in whether this is a situation in which I must respond to a motion." The court then described counsel's conduct as "a violation of civil liberties." Subsequently the court called the jury, stated that counsel were acting "subjectively in good faith [but that] the standards of a criminal prosecution in the United States require a constant awareness of the rights and liberties guaranteed by the United States Constitution." It is true that thereafter the court mentioned the government witnesses' "lamentable lack of awareness or lack of capacity in connection with their testimonial obligations," and discussed the case generally. But it returned at some length to counsel's conference with the witness, discussed extorted confessions, unlawful search and seizure, and "the duty of a court to see that every man gets a fair trial," and concluded, "Bearing in mind these principles, and responding to the motions for acquittal made by counsel . . . , I direct you at this stage to return the verdicts of acquittal. . . ."

It may be that the district court would not have conceived of this "elementary rule" if it had not already been annoyed with the believed testimonial deficiencies of the witnesses, but I have no reluctance in concluding that the reason it granted the motions for acquittal was the same one that caused it to invite them—namely, counsel's violation of the "rule." Accordingly, I concur in the judgment of the court.

ORDER OF COURT

February 2, 1961

This cause came on to be heard on petition for writ of mandamus and was argued by counsel for petitioner and for intervenors.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The petition for a writ of mandamus is granted and the writ is hereby issued directing that the judgment of acquittal entered in United States v. Standard Coil Products Co., Inc., Fong Foo and Robert Knupp, designated on the Criminal Docket of the United States District Court for the District of Massachusetts as Cr. 60-6-W, be vacated and ordering that the above case be reassigned by that court for trial before another judge.

By the Court:
ROGER A. STINCHFIELD, Clerk
By /s/ DANA H. GALLUP,
Chief Deputy Clerk.

APPENDIX "B"

United States District Court

DISTRICT OF MASSACHUSETTS

Crim. No. 60-6 — WYZANSKI, D. J. and a Jury

UNITED STATES OF AMERICA

v.

STANDARD COIL PRODUCTS CO., INC., *et al.*

APPEARANCES:

GEORGE CANER, ESQ. and
JOSEPH MITCHELL, ESQ.,
for the government

JAMES ST. CLAIR, ESQ. and
SAMUEL ANGOFF, ESQ.,
for the defendants

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* * * *

FIFTH DAY

Court Room No. 6
Federal Building, Boston
September 14, 1960

* * * *

[Transcript, pp. 370-84.]

The COURT. The jury is excused.

(The jury leaves the court room at 10:55 a.m.)

The COURT. If there is any press reporter in the court room what I now say is of course subject to being reported

after the trial is over, but I want to be very clear it does not get into the newspapers during the trial. I shall treat it as a contempt if it gets into the newspapers due to the deliberate defiance of my instructions. So I now am telling all of you that of course at an appropriate later time you can say what you like about what goes on now but you are not to say it to anybody for the purpose of it being reported in a newspaper during the trial because I do not want what I am going to say to reach the jury under any circumstances.

First of all, I am going to ask Mr. Caner and Mr. Mitchell: Is there any other principal Government witness with respect to the kind of items which have been covered by the witness on the stand, Mr. Palliotto?

Mr. CANER. There is one, yes, your Honor.

The COURT. Is he one whose credit in your opinion will stand better after examination than this witness' credit?

Mr. CANER. I think his credit will be good, your Honor.

The COURT. I didn't ask you that.

Mr. MITCHELL. Your Honor, I think that Mr. Palliotto is just a little confused.

The COURT. A little confused? This has gone on for two or three days. I am going to tell you that if I were the United States Attorney in this case and my principal witness were testifying as this witness has done I would forthwith nol pros the case.

Mr. CANER. If the Court please, this witness was put on to testify simply to give explanatory material. This witness was not put on at this stage to testify to any matters concerning the fraud. It may be, and it obviously is, that his explanations have not been as clear as they might be. But, if the Court please, he is not our principal witness by any stretch of the imagination.

The COURT. There are all kinds of character in a lawyer. One of them is the kind of character which enables him to realize in what situation a witness for whom he is not responsible has placed his case, and it is the

responsibility of the United States Attorney and his assistants to reflect whether the great interests of justice, which are their primary concern, are served by a prosecution which depends upon a witness of the character that this witness has revealed on the stand.

I will take a 15-minute recess for the purpose of enabling the United States Attorney and his assistants to consider whether the public interest is served by a further prosecution of this case.

(Recess.)

[Jury excused.]

[Conference at the bench at which the following was recorded:]

The COURT. I note that Mr. Richardson has joined the government counsel, and I am going to undertake very briefly to state to him as well as to other counsel why I have done the, for me, entirely unprecedented thing of asking the United States Attorney to consider whether to nol pros the case at this stage.

The cold record perhaps inadequately conveys the total picture as it has developed in the last few days of testimony, and in particular the testimony of the witness Palliotto, who is on the stand.

A judge ought not to deceive himself into believing that he knows how a jury will act. Yet I feel reasonably confident, and I believe my confidence is shared by Mr. Duwan, the Clerk, who has sat through the trial and who is, like myself, a neutral and a person of some experience in the court, that there is no chance whatsoever that this jury would convict these defendants if a conviction required any credit of Mr. Palliotto.

I make no statement as to whether the defendants are guilty or not guilty, and I will make it clear that I am in no way casting any reflection on the United States Attorney

or any of his assistants, including most specifically Mr. Caner and Mr. Mitchell. I am not doubting any of the proceedings before the Grand Jury. I am looking merely at the situation in which this Court and Jury are presented with the testimony of a man who may intend to tell the truth but seems absolutely incapable of so testifying as to persuade neutral persons that he has a mind with a discriminating capacity to observe, the strength to remember, the skill to narrate, and the total awareness of the proceedings in which he, and more particularly the defendants, find themselves.

If it were not so serious a matter, it would be humorous to refer to the kinds of things which this witness has said. On one occasion he will give an answer in the affirmative, and a few minutes later when the situation is really not changed in any respect he takes a diametrically opposite position. He seems not to realize the ambiguity his testimony has created. He seems to be unresponsive to repeated warnings by the Court that there could be no more serious matter than the offering of testimony in a criminal case, and that the witness should pause and reflect if he is in doubt, but should not plunge himself and the rest of us into a series of confusions.

So far as his narrative ability goes, he has been responsible for some of the most humorous blunders that I remember. He referred to the signals which were being given by Exhibit 1, the radiosonde, as "spurious." What he meant, as it finally developed, was that they were signals which were given on the spur of the moment, that is to say, instantaneous. The misuse of the word "spurious" in a case in which one of the important allegations in the indictment is that there were frauds committed upon the government in connection with the testing system, rises to a degree of risk to the defendants to which they ought not to have been subjected.

I am not in any way intimating that this was the fault

of the United States Attorney or his assistants. It just stands as a dramatic instance of the unawareness of the witness as to what his testimony means in a case like this.

Again a strange misuse of language, which I think did not prejudice, was his reference to "virgin women's hair," by which he meant the hair of a woman which was not dyed.

A witness who has so little understanding of the language and who has so frequently made utterances which have confused the Court, and I feel quite certain the Jury, is a very slender reed on which to make a man's fate depend.

Now, I know I have heard only four days of testimony, and I am aware that sometimes, as Thomas Dewey as District Attorney illustrated, one must secure convictions on the testimony of prostitutes, pimps, and worthless people. One may have no choice but to proceed on the basis of persons of poor character and worse reputation. But in general when such convictions have been secured they have been because though men and women have been worthless outside the court room, they have seemed to be creditable or worth believing in the court room.

I can't feel that any trust could be placed in this witness, and if in the end the Jury did believe this witness, I think it would be almost inevitable that I would have to set aside the verdict as not being a verdict which could be granted full credit as being a verdict based upon evidence beyond a reasonable doubt.

Mr. Duwan, have I really overstated your position? Never mind whether you agree with every paragraph I have said, but have I overstated your position?

Mr. DUWAN. No, not at all.

Mr. RICHARDSON. May I comment briefly before I ask Mr. Caner to comment on the basis of his more detailed knowledge of the government's case?

I think in the first place we should make it clear that this witness was called for a limited purpose not central to

establishment that wrongdoing had occurred. As I understand his testimony, it was to have attempted to explain the nature of the tests that were to be used under the terms of the government's contract on procuring these radiosondes.

The government would rely entirely on other witnesses to show that those tests were not carried out, and in fact they were falsified.

We believe, therefore, that whatever the Jury's impression of this witness generally, that its judgment as to whether the defendants are guilty would and should rest upon testimony of witnesses who will testify that under the instructions of the defendants they did not follow the procedures prescribed and that they in fact falsified those procedures.

Would you like to supplement that, Mr. Caner?

Mr. CANER. I would like to say that I think the case could well have proceeded by introduction of the documents, particularly the specification, which set forth the test procedures, and then the fraud witnesses could have been called. My purpose in calling Mr. Palliotto was to explain just how primarily the testing procedures were supposed to work, because it did not seem to me that by just simply reading the printed document the Jury could understand how the test procedures were supposed to be operated.

The COURT. Mr. Caner, you are not on trial. I don't want you to think I have made any criticism of the way you choose to present the matter.

Mr. CANER. I don't infer that. I address myself to the point that this witness testimony is not material to anything relating to the fraud charged in this case. The witness was called to explain it. He has not done a good job of explaining, I grant you that, but the specifications themselves set up the procedure. I think that at least the way the test was supposed to have been operated has been ex-

plained, perhaps not perfectly, but it has been explained, and even if it hasn't been explained it is set forth in the specifications.

This witness was not to be our primary witness. I had not anticipated by any stretch of the imagination that he would take this long. The fraud witnesses are here, they have been here for many days, they are the ones who will prove the case against the defendants.

The Court has not heard one-tenth of the testimony in this case, and none of the fraud testimony. I do not think that this witness' testimony has to be believed in any degree in order for a conviction to stand, because the documents, as I say, do speak for themselves as to the test procedure, although not well enough to instruct the Jury, not knowing the instrument, just how test procedures were conducted.

Therefore, it is my view that the witness' testimony is not material to the fraud, and that I would be derelict in my duty in not proceeding with the case.

Mr. RICHARDSON. I might add that I did keep in fairly close touch with the presentation of this case to the Grand Jury, and would simply like to underline in the light of that degree of exposure to the case that what Mr. Caner says about the importance to the government case of the fraud witnesses who have not yet been heard, is basic, and I therefore feel that to draw a conclusion based upon the testimony of this witness would not fairly give the government an opportunity to present to the Court and Jury the evidence on which the Grand Jury proceeded in charging these defendants.

The COURT. I want to make it absolutely clear that I am going to allow the government to go ahead. I want further to make it absolutely clear that neither now nor previously have I intended to suggest that the defendants are innocent or not guilty. Neither now nor previously have I intended to suggest that the Assistant United States

Attorney, Mr. Caner, or the Assistant United States Attorney, Mr. Mitchell, or anybody else, has been at fault or negligent, or failed to exercise such professional skill as the case required.

All that I have said is that regardless of what other witnesses testify with respect to the merits of the alleged fraud, I do not believe that there is a chance that this Jury will convict these defendants, and that you can suppose that Mr. Duwan and I have at least sat often enough in criminal cases to know that whether the United States Attorney was innocent or not, whether he was skillful or not, the impression created is now ineradicable in our view. Isn't that right, Mr. Duwan?

Mr. DUWAN. So far.

Mr. RICHARDSON. With full deference to Mr. Duwan, and conceding that a jury asked now to vote——

The COURT. I didn't say asked now. I am talking about whether it will be overcome.

Mr. RICHARDSON. I think they may feel when they have heard the fraud witnesses that the perspective that they then have on the testimony of this witness is totally different.

The COURT. The unfortunate thing from the government's point of view is that this witness has been on the stand now for four days. No one can overlook the fact that in spite of all instructions to jury, they don't hold their minds in absolute suspension, and no one can think the judges do.

Mr. RICHARDSON. I might say in that connection that it had never been anticipated by the government that a witness called for such a purpose would be on the stand for this length of time, and in our view a great deal of the testimony that has been elicited during that period is not material to the government's case.

The COURT. In my view the difficulty there would re-

quire me to make a professional comment, which I would rather not do, but I invite you to read the transcript.

Mr. ST. CLAIR. The matter of procedure raises its head. I haven't examined this witness at all on any alleged fraud, because it was represented to me that he would be recalled for that purpose as a government witness. Now, if I understand he is not to be recalled for that purpose, I am going to spend the next couple of days with him on what he alleges was the fraud, because he was the government man in charge.

The COURT. That is quite correct. You were told, as I was told, that the witness would be called twice, once in connection with what was more or less background of the whole testing procedure, and once with respect to specific knowledge of specific fraud.

Mr. CANER. Yes, and we propose to do that, your Honor.

Mr. ST. CLAIR. Then he will be called later with respect to the alleged fraud?

The COURT. Yes. I am glad that the transcript is being typed out currently.

Mr. RICHARDSON. I will look at it with interest, your Honor.

The COURT. All right, bring the Jury down.

[The Jury returns to the court room.]

* * * *

EIGHTH DAY

Court Room No. 6
Federal Building, Boston
Tuesday, September 20, 1960

* * * *

[Transcript, pp. 707-18]

The COURT. I will excuse the jury for a moment.

(The jury leaves the court room at 10:18 a.m.)

The COURT. Mr. Caner, as a matter of personal privilege do you want to make any statement?

Mr. CANER. As a matter of personal privilege?

The COURT. Before I take action?

Mr. CANER. All I can say is that I have never known of any principle that I could not speak to a witness.

The COURT. In the course of his testimony to induce him to change his testimony and to do it outside of court?

Mr. CANER. I had never known of any reason why I couldn't talk to a witness and ask if his testimony on a particular point was accurate. Nobody has ever said to me that that was improper, and I am completely astonished that the Court should think it was improper for me to have talked with the witness concerning his testimony.

The COURT. (To the witness) You had better leave the room for a moment. I have directed the witness to leave the room.

(The witness leaves the court room.)

Mr. CANER. There is no way I know of to prepare a case other than talk to a witness.

The COURT. This has nothing to do with the preparation of the case. This is *in medias res:* while the witness is on the stand during a recess counsel speaks with him privately about his testimony.

Mr. CANER. I had never known anything improper about that, your Honor.

The COURT. You will very soon learn. Is there anything else you want to say as a fact about this matter?

Mr. MITCHELL. Well, your Honor, it was partly at my suggestion that Mr. Caner questioned him concerning this.

The COURT. You were here and you knew he was on the stand. You knew there was a recess. You know the principle that a witness must be examined in public. You know that, without suggesting for a moment that you offered any improper inducement, tampering with a wit-

ness is one of the most dangerous things in connection with a case, and particularly a criminal case, that a person should be left entirely alone during the course of his testimony. You must know that elementary fact and elementary rule.

Mr. MITCHELL. We wanted the truth to come out, your Honor.

The COURT. Thank you. I am glad that the truth has come out.

Mr. CANER. Your Honor, I went to disclaim any intention or act of tampering with the witness.

The COURT. It depends upon what you call tampering. The facts speak for themselves.

Is there any other fact I haven't had called to my attention?

Mr. CANER. I do not want Mr. Mitchell to share the blame on this matter, your Honor.

The COURT. I am not proposing to take any disciplinary action against you or against Mr. Mitchell. I am merely interested in whether this is a situation in which I must respond to a motion.

Mr. CANER. Well, if the Court please, the matter which I talked to him about in regard to the date is a matter that other witnesses will testify to, concerning when it happened. It can be ascertained when it happened.

The COURT. Surely it can be ascertained by examination in public. I haven't any doubt that he can properly have his attention called in public to errors, and suggestions can be made to him as to the impropriety of dates.

But this was done, according to your testimony and the witness', outside of court, either in the office of the United States Attorney or somewhere like that.

Mr. MITCHELL. Your Honor, would it help you if we told you exactly what we said to the witness concerning this matter?

The COURT. I told you you could make any statement

you want to make. I haven't prevented your stating any facts you deem to be relevant. I am not talking about arguments; I am talking about facts.

Mr. CANER. Well, I asked the witness whether the discussion with Teichman was before or after the FBI investigation, and whether he made the statement in the course of the FBI investigation.

I showed him the statement, and he observed the date on the statement. I then asked him what was his best memory as to the date at which the conversation with Teichman took place, and he stated that it was September of 1957. That was what happened, and I have never been aware of any impropriety of doing such a thing, your Honor.

The COURT. I didn't mean that you were personally deliberately doing something you knew to be wicked. I am merely inquiring as to what the facts were, and whether that constitutes such a prejudice to the defendants, quite apart from your intent, as to create a situation in which the Court must act in response to a motion.

Mr. CANER. I submit, your Honor, that no prejudice to the defendants arises, because the true facts will come out during the course of trial as to when the discussion occurred.

The COURT. This is the argument which prosecutors always make with respect to every violation of civil liberties, whether it is a violation of the Fourth Amendment or a violation of the Fifth Amendment, or anything else, that this is the way to discover the truth, never mind the means.

Mr. CANER. Well, if the Court please, I submit that the point is—the actual time is not a point on which the case swings.

The COURT. It happens to be of the greatest importance, because I gave you a recess for the very purpose of laying the proper foundation, if one could be laid, with regard to the admission of what you regarded, and I take it the defense regarded, as a significant or potentially sig-

nificant piece of testimony, which had to do with whether there was a continuous conspiracy involving the attorneys, other officers of the corporation, other co-conspirators alleged in the indictment, and the defendants on trial. It was the very heart of one part of the case.

Mr. CANER. The Court said we could prove it aliunde.

The COURT. Yes, and I am trying to point out that the whole nub of one aspect of the case turns on whether indeed there was a co-conspiracy, and that you sought to prove this by testimony of the conversation in which an attorney participated. The date of that conversation was of the greatest consequence. The date of that conversation was covered in the direct testimony yesterday and was the subject, by your own admission, of an out-of-court discussion with the witness while he was on the stand, a few minutes before the opening session of the court. I think I have fairly stated what the problem is.

Mr. ST. CLAIR. If your Honor please, I assume that my brothers are finished. I don't by any means intend to infer any conscious wrongdoing.

The COURT. I think it should be made clear one hundred per cent on the record that nobody thinks either Mr. Caner or Mr. Mitchell, being fully aware of the canons and proprieties of the situation, deliberately flouted them in order to do an injustice. No one thinks they had a wicked intent.

Mr. ST. CLAIR. That is right. However, it should be brought out on the stand in direct examination if it was felt that the date was wrong.

However, it does put the defense in a very difficult position to try a case under these circumstances. I don't know how much has already gone on in this respect. I am certain no more of it will go on, but it would seem to me at the very most your Honor might entertain a motion for acquittal, which I now make on behalf of the corporation, and

at the very least you ought to strike the testimony of this witness.

Mr. ANGOFF. I now make on behalf of the individual defendants Robert Knupp and Fong Foo a motion for judgment of acquittal.

The COURT. Do you want to be heard?

Mr. CANER. Yes, if the Court please. I submit that the very most that should be done in regard to these motions is to strike the testimony of the witness, or such portion of his testimony as the Court feels has been prejudiced by what the Court states was not proper.

And in the public interest, I submit that the case should not be dismissed on account of the incident that has just occurred. There are many witnesses to be heard from, many more besides this witness. We have not heard the testimony of any of the test operators. We have only heard three witnesses in a case involving many witnesses.

I submit that at this stage to dismiss the case would make it doubtful that justice would be done.

The COURT. Will you call the Jury, and the witness will take the stand.

[The Jury returns to the court room, and the witness resumes the stand.]

The COURT. Mr. Foreman and Members of the Jury, before I say anything else, let me make it absolutely clear that counsel for the defendants as well as the Court are persuaded that neither the United States Attorney nor either of his assistants consciously or deliberately violated any canon with which they were familiar. They were acting subjectively in good faith, and I do not mean at any stage of the remarks I am about to make to criticize them in the sense that I believe that they were conscious wrongdoers.

On the other hand, a criminal prosecution is the most solemn proceeding which takes place in a court, and one of the most solemn activities with which man could be concerned on earth. The standards of a criminal prosecution in

the United States require a constant awareness of the rights and liberties guaranteed by the United States Constitution, and a constant sensitivity with respect to the value of an open trial conducted with a full protection of the rights of any individual or any corporation summoned to answer a criminal charge.

In the case before you there have been a number of difficult problems, and I have no question that you have been presented with witnesses who were the best that the government could offer, but they were witnesses who on the stand showed a lamentable lack of awareness or lack of capacity in connection with their testimonial obligations.

Frequently during the trial of this case I have had to do what I never did before in eighteen and one-half years, remind the witnesses of the solemnity of their function, and the necessity that they should recall accurately and state accurately the testimony which they were giving in matters of the utmost significance.

Were I not engaged in such a serious set of remarks to you, I would be tempted to rest upon a story which Chief Justice Wilkins told at the Judicial Conference, somewhat different from the one that I recited to you the other day. He referred to a case tried by Judge Otis Lord of the Superior Court of the Commonwealth of Massachusetts in the middle of the 19th century, and he said that after the most fluctuating kind of testimony by witnesses in that criminal case Justice Lord in addressing the jury said, "I think it would be sufficient if I instructed you that if you believe the witnesses for the government you will convict the prisoner; if you believe the witnesses for the prisoner, you will acquit him; if, like myself, you do not believe either of them you will then acquit the prisoner because the government has the burden of proof beyond a reasonable doubt."

And though that story may seem to you to be humorous,

I think you will also say that it has unilateral application to the difficulties which we have faced in this case.

That is not to say that the difficulties were created by the United States Attorney or his assistants. They were faced by them. It is in the atmosphere of this fluctuating testimony that yesterday afternoon we had testimony on a most vital point given by Mr. Rosenholm. You cannot fully appreciate how vital, because you haven't read the text of the indictment and I have not hitherto had any occasion to discuss with you the problem of conspiracy, which is one of the essential elements in a part of this indictment. And you don't know, as I do, that the prosecution was endeavoring to show that a lawyer, together with others not named as defendants, together with the defendants, conspired to defraud the United States, that in this connection the admissibility of the testimony depended to a very considerable extent upon the date of an alleged conference in which the attorney participated. But you did hear that that date was given by this witness, Mr. Rosenholm, on the stand yesterday, and that I declared a recess yesterday afternoon in order that the government might be fully prepared to lay a foundation for the admissibility of the testimony that it relied upon with respect to this alleged conspiratorial conference.

During the recess, and without in any way being conscious of a potential violation of any canon of ethics or any rule or principle, the Assistant United States Attorneys in this case admittedly conferred with this witness who was on the stand, and the conference with him took place either in the offices of the United States Attorney or in some similar place. It took place this morning before court, not under the supervision of a judge, and without the presence of the defendants or counsel for the defendants.

In this situation the witness took the stand this morning and on this very vital point gave an altered version in which the date now given becomes quite significant and has

a connotation and importance which the date he gave yesterday did not have.

He is a witness who already has shown either a lamentable lack of memory or an extraordinary power of inventiveness, as you will recall in connection with the cards where he gave a whole series of answers which he withdrew.

With due regard for the principles of justice under law, I must bear in mind not only what may be correct, but what is fair. In our constitutional system, under our jurisprudence, many things which are true are not allowed to be shown. Examples are a confession extorted by physical coercion; such a confession is not admissible although it may be perfectly correct and the defendant may be guilty. Likewise, information procured by an unlawful search and seizure may be prefectly true and the defendant may be guilty; nevertheless it is well settled that no conviction can be based lawfully upon information unconstitutionally procured by an unreasonable search or seizure.

These principles illustrate the sensitivity of American courts to fair play in connection with every aspect of the criminal law. It is not the duty of a court to see that every guilty man is punished. It is the duty of a court to see that every man gets a fair trial. The highest public interest is not the punishment of the wicked, but the establishment and maintenance of justice under law.

Bearing in mind these principles, and responding to the motions of acquittal made by counsel for the indivividual defendants and the corporate defendant, I direct you at this stage to return the verdicts of acquittal with respect to each of the individuals and with respect to the corporation.

[The Court then heard requests of Jurors to be excused.]

The COURT. The defendants will stand. [The defendants complied.] You have been acquitted by direction of the Court and by the Court. Your bail is terminated. You are free.

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JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

October Term, 1960

No. 735

STANDARD COIL PRODUCTS CO., INC.,
Petitioner,

—against—

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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IN THE

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No.

STANDARD COIL PRODUCTS CO., INC.,

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—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioner, Standard Coil Products Co. Inc., respectfully prays that a writ of certiorari issue to review the order of the United States Court of Appeals for the First Circuit entered in this case on February 2, 1961 issuing a writ of mandamus upon petition by the Government directing that the judgment of acquittal of petitioner in a criminal proceeding entered in the United States District Court for the District of Massachusetts by direction of the trial judge (Wyzanski, J.) be vacated and ordering that the case be reassigned for a new trial before another judge.

Opinions Below

There was no formal opinion of the United States District Court. The statement by the District Court to the jury in directing the verdict of acquittal is reproduced in Appendix D, pp. 32a-36a.

The opinion of the Court of Appeals has not yet been reported. It is printed as Appendix B to this petition, at pages 5a-29a.

Jurisdiction

The order of the Court of Appeals was entered on February 2, 1961 (Appendix C, pp. 30a-31a). On February 28, 1961, Mr. Justice Frankfurter extended the time within which this petition might be filed to March 15, 1961. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).[1]

Questions Presented

1. Whether the double jeopardy clause of the Fifth Amendment of the Constitution of the United States bars a new trial of the defendant for the same alleged federal crime after a judgment of acquittal has been entered in the previous trial before a federal court of competent jurisdiction, where, in the previous trial, a jury was impaneled and sworn, the Government presented evidence for seven days, the trial court directed a judgment of acquittal before the close of the Government's case, the jury was discharged and the defendant was freed.

2. Whether the Court of Appeals has jurisdiction, upon petition by the Government, to issue mandamus directing that a judgment of acquittal entered in a criminal proceeding by order of the trial judge be vacated and directing

[1] The decree of the Court of Appeals issuing mandamus is a final judgment in an independent adversary suit. *Missouri ex rel. St. Louis B. & M. R. Co.* v. *Taylor*, 266 U. S. 200, 206 (1924). See *Roche* v. *Evaporated Milk Ass'n*, 319 U. S. 21 (1943).

that a new trial be had, when no right of appeal exists from such judgment of acquittal.

3. Did the United States District Court have the power during a criminal trial to direct a judgment of acquittal before the close of the Government's case.

4. Did the United States District Court have the power during a criminal trial to direct a judgment of acquittal before the close of the Government's case where:

(i) Evidence was received for seven days; (Tr. 1-718).[2]

(ii) The trial judge found that the Government's two principal witnesses displayed a "lack of awareness or lack of capacity in connection with their testimonial obligations" (Appendix D, p. 33a);

(iii) The trial judge found that it was prejudicial to the defendants when one of such witnesses changed his testimony with respect to a vital date in the Government's case as a result of a talk with the prosecuting Government attorney during an overnight recess (Appendix D, p. 35a); and

(iv) the trial judge concluded that justice required him to grant the defendants' motion for a judgment of acquittal (Appendix D, pp. 35a-36a).

5. Whether the Court of Appeals in a mandamus proceeding may review and vacate a judgment of acquittal directed by a trial court of competent jurisdiction if it determines that the trial court did so erroneously.

---

[2] The reference "Tr." is to the transcript of the trial proceedings.

6. Did the Court of Appeals commit error in determining that the trial judge acted improperly in directing a verdict of acquittal.

7. Did the Court of Appeals commit error in disqualifying Judge Wyzanski from presiding at the new criminal trial directed by the Court of Appeals absent any such request by the Government and without compliance with 28 U.S.C. §144.

Constitutional Provisions, Statutes and Federal Rules Involved

The constitutional provision involved is the double jeopardy clause of the Fifth Amendment, providing as follows:

> ". . . nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; . . ."

The following statutes are involved and are printed as Appendix A to this petition, page 1a:

18 U.S.C., Sections 371 and 1001, under which the petitioners were indicted and tried.

18 U.S.C., Section 3231, conferring jurisdiction upon the District Court.

28 U.S.C., Section 1651(a), under which the Court of Appeals purported to issue its writ of mandamus.

28 U.S.C., Section 144, which provides the conditions for disqualification of a trial judge.

Federal Rules of Criminal Procedure, Rules 29(a), 37(a).

Statement of the Case

Petitioner and two of its employees were indicted by a federal grand jury for alleged violations of 18 U.S.C. § 1001 (concealment of material facts within the jurisdiction of a federal agency) and 18 U.S.C. § 371 (conspiracy to violate 18 U.S.C. § 1001). They pleaded not guilty and were placed on trial before a jury in the United States District Court for the District of Massachusetts, which had jurisdiction of the case under 18 U.S.C. § 3231.

The indictment, containing nine counts, alleged a conspiracy to falsify and the falsification of test records and the concealment thereof with respect to radiosondes manufactured by petitioner during the period from September, 1956 to November, 1957 in the performance of two contracts with the Army Signal Supply Agency (Appendix B, pp. 5a-6a). Radiosondes are electronic devices for furnishing weather data (Appendix B, p. 6a).

On September 8, 1960, the trial commenced, the jury was impaneled, and evidence was presented by the Government. On September 20, 1960, after seven days of trial and before the Government had closed its case, upon motions made by the defendants, the trial judge directed a verdict of acquittal of all three defendants (Appendix D, p. 36a). The judgment of acquittal was entered the following day (Appendix E, p. 46a).

In his opening statement to the jury, the Assistant United States Attorney in charge of the prosecution stated that he proposed to present the Government's case in two parts:

> "Before you can follow the testimony about the falsification of the tests you will have to know some-

> thing about the instrument involved, how it was made and how it was to be tested . . . how the tests were supposed to be run" (Tr. Opening to the Jury, 2, 6).

After introducing into evidence the radiosonde contracts, the Government called one Constanz Paliatto, its principal witness, to the stand. Paliatto was the Quality Assurance Representative of the Army Signal Supply Agency (Tr. 7-8) who had personally initiated the complaint and investigation of the alleged wrongdoing (Tr. 362-64) and who was stationed at the petitioner's plant as the chief representative of the Army Signal Supply Agency to supervise the testing and acceptance of the radiosondes during the period of the alleged wrong-doing (Tr. 10-11). The trial court was informed by the Government that Paliatto was being called first as the witness who would establish the proper tests (the aforementioned first part of the Government's case) and that at a later stage in the proceedings he would be recalled to testify as to the alleged falsification of such tests (Tr. 29-30, 383-84, Appendix D, pp. 42a, 45a). Paliatto testified on the first part of the Government's case for more than five days (Tr. 7-566).

The trial judge found, and the Court of Appeals agreed, that Paliatto's testimony was confused and conflicting (Appendix D, pp. 37a, 39a; Appendix B, p. 12a) and according to the trial judge, Paliatto's testimony was not trustworthy and could not be given any credit (Appendix D, pp. 37a, 40a).

During the course of Paliatto's testimony, the trial judge found it necessary to ask him numerous questions to elicit detailed explanations of the complicated testing procedures involved. Paliatto's answers to questions caused the trial

judge on several occasions to caution the witness to think before he testified and to consider more carefully his testimony and its importance in a criminal proceeding (Tr. 117, 139, 159, 299, Appendix D, p. 33a). Every opportunity was given the witness to clarify and explain his testimony, including several recesses declared by the trial judge during Paliatto's direct examination to afford him the opportunity to rehearse his explanations of technical matters with Government counsel (Tr. 65-66, 111, 148). After hearing Paliatto's testimony for more than five days, the trial court found it necessary to remind the witness of the crime of perjury (Tr. 564).

During the course of his testimony Paliatto admitted that all the tapes on which the allegedly falsified test results had been recorded had been delivered to him (Tr. 155 A 5-6) and he had destroyed them—even after he had allegedly become suspicious of the test results and even after he had made his complaints to the F.B.I. (Tr. 364, 369-70).

During the fifth day of testimony, the trial judge conferred with the two Assistant United States Attorneys participating in the trial and the United States Attorney, who joined in the conference at the bench. Judge Wyzanski, an able, skilled and experienced trial judge, recommended to the United States Attorney, in the public interest, that he *nolle prosse* the case against the defendants (Appendix D, pp. 37a-38a). The trial judge at this point further stated that he did "not believe that there is a chance that this Jury will convict these defendants" (Appendix D, p. 43a), and that even if in the unlikely event the jury were to return a verdict of conviction, it would be "almost in-

evitable" that he would have to set aside such a verdict (Appendix D, pp. 40a-41a). After these statements by the trial court, the Assistant United States Attorney took the position that Paliatto, who had testified for five days, was not a principal witness and his testimony was not necessary to prove the Government's charge of fraud (Appendix D, pp. 41a-42a). This was a complete reversal of the position taken by the Government's counsel in his opening to the jury where he told the jury that the testimony to be given as to the proper test procedures was necessary "(b)efore you can follow the testimony about the falsification of the tests. . . ." (Tr. Opening to the Jury, 2, 6). Despite the trial court's recommendation, the Government decided to proceed with the trial.

The next principal witness called by the Government was one Rosenholm, a former employee of petitioner, who identified himself as the "final inspector of" radiosondes (Tr. 600, Appendix B, pp. 7a-8a). This witness had been named as a co-conspirator but not as a defendant (Tr. 668). During the direct examination of Rosenholm, the trial judge considered terminating the proceedings on his own motion because of the actions of the prosecuting attorney (Tr. 677). The judge had previously considered declaring a mistrial during the course of Paliatto's testimony for the same reason (Tr. 155 A 32).

The trial judge found, and the Court of Appeals agreed, that Rosenholm's testimony was conflicting (Appendix D, p. 35a; Appendix B, p. 12a), and according to the trial judge his testimony, as Paliatto's, exhibited a "lamentable lack of awareness or lack of capacity in connection with [his] testimonial obligations" (Appendix D, p. 33a).

At one point in his testimony Rosenholm retracted and completely changed an important segment of his prior testimony upon which the Government based in part its charge of fraud (Compare Tr. 672-75 with Tr. 667). It was following this admission of invented testimony that Rosenholm also changed his testimony with respect to the date of an alleged conversation with a representative of petitioner in order to bring the date within the period of the indictment (Compare Tr. 693 with Tr. 681). The date of this conversation was material since the Government's theory was that the concealment of fraud charged in the indictment occurred after this conversation in which petitioner's representative was allegedly apprised by Rosenholm of wrongdoing (Tr. 689-90). During cross-examination it was revealed that this change of dates in Rosenholm's testimony was the result of his talk with the Government's prosecuting attorneys that very morning before the trial resumed (Tr. 704-05).

At this point the trial judge excused the jury and after an extended colloquy with Government counsel during which, among other things, Government counsel stated that they had testimony of other witnesses in support of the allegations of the indictment, the trial judge stated that the Court would entertain appropriate motions. The defendants then moved for acquittal (Tr. 707-14). The trial judge recalled the jury and expressed to them his opinion that the testimony of the two principal Government witnesses (Paliatto and Rosenholm) was not reliable; he criticized the action of the prosecuting attorney in talking with Rosenholm so that Rosenholm could change his testimony, and stated that the defendants had been prejudiced in their rights to have a fair trial. The trial judge thereupon in-

structed the jury to return a verdict of acquittal (Appendix D, pp. 32a-36a).

The trial judge then directed the defendants to stand up, and announced: "You have been acquitted by direction of the Court and by the Court. Your bail is terminated. You are free" (Appendix D, p. 36a).

Neither the Government nor the defendants sought an appeal, but on October 28, 1960, thirty-seven days after entry of the judgment of acquittal (after the allowable time for appeal by any party), the Government filed a motion for leave to file a petition for writ of mandamus in the United States Court of Appeals for the First Circuit, which motion was allowed by the Court of Appeals (R. 1-2). The petitioner and the individual defendants were permitted to intervene in the mandamus proceedings in the Court of Appeals and opposed issuance of the writ (R. 55-58).

After receiving briefs and hearing oral argument, on February 2, 1961 the Court of Appeals ordered that a writ of mandamus issue, vacating the judgment of acquittal and remanding the case for a new trial before a different judge of the District Court (Appendix C, p. 30a).

The majority of the Court of Appeals was not certain whether the trial judge had directed a judgment of acquittal because of the quality of the Government's evidence or because the trial judge believed the action of the Assistant United States Attorney had prejudiced the defendants, but held that this distinction was of no consequence (Appendix B, pp. 11a-12a) because in either case the trial court had acted so erroneously under the circumstances that "the judge had no power, that is to say, jurisdiction,

to terminate the Government's presentation of its case in mid-course by entering judgment of acquittal and that mandamus lies to correct the error" (Appendix B, p. 17a).

The Court of Appeals denied to defendants the defense of former jeopardy when they were to be tried again. The reasoning of the Court's majority opinion was as follows:

> "It will suffice for us to say that from our conclusion that the trial judge had no power, that is to say no jurisdiction, to enter judgment of acquittal, it follows under principles too well established to require citation of authorities that the judgment is void—a nullity—and hence affords no basis for the defense of double jeopardy. See *Mitchell* v. *Youell*, 130 F. 2d 880 (C.A. 4, 1942)" (Appendix B, p. 22a).

Reasons for Granting the Writ

1. The vital public issue presented by this case is whether a defendant in a criminal proceeding in the federal courts may constitutionally be subjected to the jeopardy of a second trial after he has once been put to trial for the same offense before a jury, seven days of evidence has been presented, and the trial judge has terminated the proceedings before the close of the Government's case by directing a judgment of acquittal.

It is well settled that once a criminal trial has been commenced and the jury impaneled or evidence introduced, the defendant has been placed in jeopardy. *Green* v. *United States*, 355 U. S. 184, 188 (1957). Prior jeopardy, not an error-free judgment of acquittal, is the determining factor in whether a defendant can be retried for the same alleged offense. *Green* v. *United States*, *supra* at 188; *Kepner* v.

United States, 195 U. S. 100, 130 (1904); *United States* v. *Ball,* 163 U. S. 662, 671 (1896).

Only two exceptions to this basic rule are recognized. One is where a conviction has been reversed on an appeal brought by the defendant. *Forman* v. *United States,* 361 U. S. 416, 425 (1960). The second exception is where a mistrial is declared under certain strictly limited circumstances, such as the inability of the jury to agree on a verdict, *Logan* v. *United States,* 144 U. S. 263, 298 (1892), or in cases of compelling necessity, *United States* v. *Whitlow,* 110 F. Supp. 871, 876 (D.D.C. 1953). Certiorari has been granted by this Court to clarify the mistrial-double jeopardy question in *United States* v. *Gori,* 282 F. 2d 43 (2nd Cir. 1960), Supreme Court Docket No. 486.

Neither of these two exceptions to the constitutional command that no person shall be twice put in jeopardy of life or limb applies in this case. The Court of Appeals below conceded that it would not grant mandamus if the new trial ordered by it would be barred by the Fifth Amendment, but it held that the bar of double jeopardy did not apply, relying on *Mitchell* v. *Youell,* 130 F. 2d 880 (4th Cir. 1942) (Appendix B, pp. 21a-22a).

The *Mitchell* case is completely inapplicable. In *Mitchell* the Court of Appeals set aside a sentence and conviction in a state court upon a petition for *habeas corpus* on the ground that the denial of counsel to the defendant violated the Fourteenth Amendment to the Constitution. The Court further stated that double jeopardy would not bar a new trial in the state court. Obviously, the double jeopardy provision of the Fifth Amendment was not applicable in *Mitchell. Palko* v. *Connecticut,* 302 U. S. 319 (1937). More-

over, in the present case, there was an acquittal, not a conviction, no petition was sought by the defendant and there was no constitutional infirmity in the proceedings in the United States District Court.

The decision of the Court of Appeals to the effect that the defendants may be tried again on the same indictment (on the theory that the judgment of acquittal is a "nullity") strikes at the heart of a constitutional right which is fundamental to our concepts of justice. It contravenes the "elemental principles of our criminal law that the Government cannot secure a new trial by means of an appeal even though an acquittal may appear to be erroneous". *Green* v. *United States*, 355 U. S. 184, 188 (1957).

This Court should [illegible] whether the Fifth Amendment guarantees that a defendant who has been placed in jeopardy before a court of competent jurisdiction and expressly acquitted of the crime charged by that court shall thereafter be free of further prosecution for the same alleged offense.

2. The question of double jeopardy in this case presents another facet of the issue of double jeopardy now before this Court in the case of *Gori* v. *United States*, Supreme Court Docket No. 486. The decision of the Court of Appeals in the *Gori* case is reported at 282 F. 2d 43 (2d Cir. 1960). In the *Gori* case, the Court of Appeals for the Second Circuit held that where a criminal trial was terminated in the District Court before the close of the Government's case by a mistrial declared by the trial judge who was acting to protect the rights of the defendant, the defendant could be tried again for the same offense and the bar of

former jeopardy did not apply notwithstanding the mistrial was without the defendant's request or express consent.

In the present case, the criminal trial in the District Court was also terminated before the close of the Government's case, but here by a judgment of acquittal directed by the trial judge with the intention of having the bar of double jeopardy attach.

This Court should determine whether the Fifth Amendment bars a new criminal trial for the same alleged federal offense where the previous trial has been terminated by the trial judge prior to the close of the Government's case with the intention of barring further jeopardy to the defendants and the defendants had not requested nor consented to the termination of such prior trial on any basis other than that further prosecution for the same offense be forever barred.

3. This case also presents an important question in the administration of justice in criminal proceedings in the federal courts: whether a judgment of acquittal by a court of competent jurisdiction can be attacked collaterally by mandamus upon petition by the Government where the Government has no right of appeal from such judgment.

The majority opinion of the Court of Appeals stated that there was no case in point to support its affirmative holding on this question. (See Appendix B, p. 21a).

Petitioner submits that the decision of the Court of Appeals in the instant case is in conflict with *United States* v. *Weissman*, 266 U. S. 377 (1924) where this Court held that the Government could not obtain appellate review of a judgment of not guilty directed by the trial judge after the

jury had been impaneled and sworn, but before *any* evidence had been presented. Writing for a unanimous court, Justice Holmes stated at page 379:

> "Furthermore, if directing the verdict was wrong, it certainly was not beyond the jurisdiction of the court. The jury were there and the prisoners before them; and, so far as jurisdiction is concerned, it did not matter whether evidence had been put in or not. We stop at the point of jurisdiction, the want of which would be the only pretext that could be offered for going behind the literal meaning of the statute. But we do not mean to imply that an opening by counsel or the offer of evidence is necessary in order to justify directing a verdict of not guilty; there are other cases in which it is done."

It is amazing that neither the majority nor concurring opinions of the Court of Appeals mention the decision of this Court in *United States* v. *Weissman, supra*, despite the citation and argument to the Court of Appeals by both the Government and the defendants of the *Weissman* decision.

The decision of the Court of Appeals below permitting a collateral attack by the Government on a judgment of acquittal entered by a court of competent jurisdiction is in conflict with the principle enunciated in *Ball* v. *United States*, 163 U. S. 662 (1896) at 669-70, where the Court stated:

> ". . . if the court had jurisdiction of the cause and of the party, its judgment is not void, but only voidable by writ of error; and, until so avoided, cannot be collaterally impeached. . . . If the judgment is upon an acquittal, the defendant, indeed, will not seek to have it reversed, and the government cannot. *United States* v. *Sanges*, 144 U. S. 310."

The decision in the instant case is also in conflict in principle with the decision of the Court of Appeals for the Ninth Circuit that the Government has no right of appeal in a criminal case in which the trial court has dismissed the case prior to the introduction of any evidence, where such dismissal "is equivalent to a judgment founded upon a directed verdict of acquittal." *Heath* v. *United States,* 260 F. 2d 623, 632 (9th Cir. 1958).

The decision of the Court of Appeals below is also in conflict with the earlier decision of that court in *Ex parte Farrell,* 189 F. 2d 540, 545 (1st Cir. 1951). Chief Judge Magruder, writing for the court in the *Farrell* case, stated (at page 545):

> "Where the appeal statutes establish the conditions of appellate review, an appellate court cannot rightly exercise its authority to issue a writ under the 'all writs' section, 28 U.S.C. §1651, the only effect of which would be to avoid those conditions and thwart the congressional policy. [Citing cases] For us to grab hold of the present case under 28 U.S.C. §1651 would not be in aid of our appellate jurisdiction elsewhere granted by law, but would be a palpable evasion of the statutory conditions which Congress has seen fit to impose upon our exercise of appellate jurisdiction in this class of cases."

The Government's right to appellate review in a criminal case is strictly limited to the instances specified by statute. *Carroll* v. *United States,* 354 U. S. 394, 399-402, 407-408 (1957).

The "all writs" statute, 28 U.S.C. §1651(a) limits the jurisdiction of the Court of Appeals to issue a writ of

mandamus only when it is in aid of its jurisdiction and agreeable to the usages and principles of law. *Roche* v. *Evaporated Milk Ass'n*, 319 U. S. 21, 25 (1943).

A judgment of acquittal having been entered by a court of competent jurisdiction and there being no right of appeal therefrom, there was no appellate jurisdiction in aid of which the Court of Appeals could issue a writ of mandamus. *United States* v. *Weissman*, 266 U. S. 377 (1924). See *Ex parte Pennsylvania*, 137 U. S. 451 (1890).

After the judgment of acquittal was entered, there was no actual or potential appellate jurisdiction remaining in any appellate court. Any possible basis for appeal expired when the statutory time of thirty days in which to appeal had passed, the Government having applied for the writ thirty-seven days after the judgment of acquittal was entered on September 21, 1960.

If a Court of Appeals is free to review and vacate a judgment of acquittal by use of mandamus, a new and revolutionary concept with obvious widesweeping implications is introduced into our federal criminal law. Defendants who have been acquitted by courts of competent jurisdiction will be compelled to "live in a continuing state of anxiety and insecurity," never knowing when the Government may choose to use "its resources and power" to repeat the attempt to convict. *Green* v. *United States*, 355 U. S. 184, 187-88 (1957).

4. Another question of great importance presented by this case is the power of a federal trial judge to control the conduct of a criminal trial.

The Court of Appeals holds that the direction of a verdict of acquittal by a federal trial judge prior to the close of the Government's case is subject to review, although conceding that the direction of a verdict of acquittal by a trial judge after the close of the Government's case is within his power and not subject to review. (See Appendix B, pp. 16a, 17a.) The Court of Appeals held that for lack of such power the judgment of acquittal directed by the trial judge was a nullity.

The present decision conflicts with the decision of the Court of Appeals for the Ninth Circuit in *United States* v. *Heath*, 260 F. 2d 623 (9th Cir. 1958), which held that the District Court could properly direct what was in effect an acquittal, even before the introduction of any evidence, for such reasons as the judge felt would prevent prejudice to defendants on trial, after ascertaining that the Government had lost certain evidence taken from the defendant and important to the defense of the case. (The present case is analogous to *Heath*, in that here the Government's key witness, Paliatto, admitted destroying the allegedly falsified test tapes, which evidence was important to the defense.) (Tr. 364, 369-370).

The decision of the Court of Appeals below is also clearly in conflict with the decision of this Court in *United States* v. *Weissman*, 266 U. S. 377 (1924). See also *United States* v. *Maryland Cooperative Milk Producers, Inc.*, 145 F. Supp. 151, 152 (D.D.C. 1956). (Trial judge has power to entertain and grant motion for acquittal before close of Government's case.)

Petitioner contends that a federal trial judge in a criminal proceeding has and always has had the inherent power

to direct an acquittal at any time that he concludes that justice so requires. Rule 29(a) of the Federal Rules of Criminal Procedure (relating to directed judgments of acquittal for insufficiency of evidence) does not take away that power. *United States* v. *Heath*, 260 F. 2d 623 (9th Cir. 1958); *United States* v. *Maryland Cooperative Milk Producers, Inc.*, 145 F. Supp. 151 (D.D.C. 1956).

A federal trial judge is charged with the responsibility of insuring that criminal proceedings are conducted with solicitude for the essential rights of the defendants. *Glasser* v. *United States*, 315 U. S. 60, 71 (1942). If the federal trial judge is to discharge that responsibility fully, he must be vested with the concomitant power necessary to perform that function, including the power to terminate a trial whenever he decides that justice so requires. The trial judge must be able to order an acquittal when it appears that further trial would be unfair and unreasonable, even if another judge or court might disagree with his decision. In the apt words of Judge Aldrich, concurring in the opinion of the Court of Appeals in this case, "It is not always necessary to eat the whole of an egg to know it is rotten" (Appendix B, p. 25a).

This Court should determine whether a federal trial judge in a criminal proceeding has the power to direct a judgment of acquittal at any stage of the proceedings if in his opinion, correctly or mistakenly, justice will be served thereby.

5. Another important question in the administration of justice in the federal courts which this case presents, is whether an appellate court can deem a District Court judge

biased and therefore disqualify him from presiding at a new trial ordered by it when no request for such disqualification has been made by a party to the trial and there has been no compliance with the provisions of 28 U.S.C., §144.

The Court of Appeals in this case although acknowledging that the Government did not request the disqualification of Judge Wyzanski from presiding at the new trial which it ordered, nevertheless directed that a different judge preside at the new trial of the defendants because, as the Court of Appeals stated, Judge Wyzanski would not be able to weigh the testimony dispassionately upon the new trial (Appendix B, p. 22a).

The decision of the Court of Appeals is in conflict with *Marquette Cement Manufacturing Co.* v. *Federal Trade Commission*, 147 F. 2d 589 (7th Cir. 1945), in which the Court of Appeals for the Seventh Circuit stated, in referring to the predecessor statute to 28 U.S.C. §144:

> "That this section of the statute must be literally and strictly observed in order to disqualify a judge is not open to question." (147 F. 2d at 592)

In the exercise of its general supervisory power over the federal courts, this Court should determine whether a Court of Appeals may without statutory authority and without the request of either of the parties to the proceeding, disqualify a federal trial judge.

CONCLUSION

For the foregoing reasons a writ of certiorari should be granted in this case. The decision of the Court of Appeals vitiates the constitutional guaranty against double jeopardy and presents serious and important questions with respect to the administration of federal criminal justice.

Respectfully submitted,

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APPENDIX A

CONSTITUTIONAL PROVISION, STATUTES AND RULES INVOLVED

Constitution

AMENDMENT V.—DOUBLE JEOPARDY

* * * nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; * * *

Statutes

18 U.S.C., SECTION 371—CONSPIRACY TO COMMIT OFFENSE OR TO DEFRAUD UNITED STATES.

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor. June 25, 1948, c. 645, 62 Stat. 701.

18 U.S.C., SECTION 1001—STATEMENTS OR ENTRIES GENERALLY.

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or

uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both. June 25, 1948, c. 645, 62 Stat. 749.

18 U.S.C., Section 3231—District courts.

The district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States . . . June 25, 1948, c. 645, 62 Stat. 826.

28 U.S.C., Section 1651—Writs.

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law. . . . June 25, 1948, c. 646, 62 Stat. 944, amended May 24, 1949, c. 139, § 90, 63 Stat. 102.

28 U.S.C., Section 144—Bias or prejudice of judge

Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the

proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith. June 25, 1948, c. 646, 62 Stat. 898, as amended May 24, 1949, c. 139, § 65, 63 Stat. 99.

FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 29—*Motion for Acquittal.*

(a) *Motion for Judgment of Acquittal.* Motions for directed verdict are abolished and motions for judgment of acquittal shall be used in their place. The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses. If a defendant's motion for judgment of acquittal at the close of the evidence offered by the government is not granted, the defendant may offer evidence without having reserved the right.

Rule 37(a)—*Taking Appeal.*

. . .

(2) *Time for Taking Appeal.* An appeal by a defendant may be taken within 10 days after entry of the judgment or order appealed from, but if a motion for a new trial or in arrest of judgment has been made within the 10-day period an appeal from a judgment of conviction may be

taken within 10 days after entry of the order denying the motion. When a court after trial imposes sentence upon a defendant not represented by counsel, the defendant shall be advised of his right to appeal and if he so requests, the clerk shall prepare and file forthwith a notice of appeal on behalf of the defendant. An appeal by the government when authorized by statute may be taken within 30 days after entry of the judgment or order appealed from.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 5755, Original

In the Matter of

UNITED STATES OF AMERICA,

PETITIONER.

PETITION FOR A WRIT OF MANDAMUS.

Before WOODBURY, *Chief Judge*, and HARTIGAN and ALDRICH, *Circuit Judges*.

Elliot L. Richardson, United States Attorney, with whom *George C. Caner, Jr.*, and *Joseph S. Mitchell, Jr.*, Assistant U. S. Attorneys, were on brief, for petitioner.

James D. St. Clair, with whom *Blair L. Perry* and *Hale and Dorr* were on brief, for Standard Coil Products Co., Inc., intervenor.

Samuel E. Angoff, with whom *Grant, Angoff, Goldman & Manning* was on brief, for Robert Knupp and Fong Foo, intervenors.

OPINION OF THE COURT.

February 2, 1961

WOODBURY, *Chief Judge*. This is a petition by the United States for a writ of mandamus directing a judge of the United States District Court for the District of Massachusetts, and also that District Court, to vacate a "Judgment of Acquittal" entered by the judge in a criminal case, to reassign the case for trial, and for such other and further relief as this court may deem just.

A grand jury in the court below returned an indictment in nine counts against Standard Coil Products Co., Inc., an

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Illinois corporation, which at the time covered by the indictment had a manufacturing plant in North Dighton, Massachusetts, and two individuals then employed by it at that plant, one as the Chief of its Quality Control Department and the other at first as a supervisor and later as the foreman in charge of the production of certain electronic instruments to be described presently, charging all three with the offenses of concealing material facts and conspiring to conceal material facts in a matter within the jurisdiction of an agency of the United States in violation of Title 18 U.S.C. § 1001 and § 371. More specifically the charges were that from September 1956 to November 1957 the accused had knowingly and wilfully falsified, and conspired between themselves and with others to falsify, tests of radiosondes[1] being manufactured at the time in the plant at North Dighton under two contracts entered into by Standard Coil Products Co., Inc., with the Army Signal Supply Agency.

Motions to dismiss the indictment were denied and the defendants were set to the bar to be tried by jury on their pleas of not guilty.

One of the two Assistant United States Attorneys who represented the Government at the trial made an opening statement to the jury in which he explained the general nature of the charges laid in the indictment and the evidence he proposed to introduce saying that the presentation of the Government's case would fall naturally into two

[1] These are electronic devices for furnishing weather data designed to be dropped from airplanes in remote places and while floating to earth by parachute to transmit continuous radio signals in Morse Code indicating the temperature, pressure and humidity of the air through which they pass.

parts, the first part consisting of evidence explanatory of the instruments and of the procedures for testing them and the second part consisting of evidence of deliberate and conniving falsification of the tests run on the instruments by the defendants. In carrying out this program the Assistant United States Attorney in charge at the trial called a witness through whom he introduced the contracts and related documents under which the radiosondes were manufactured by Standard Coil Products Co., Inc. He then called the "Quality Assurance Representative" of the Army Signal Supply Agency who had been stationed at the corporate defendant's North Dighton plant during the time involved for the purpose of supervising the inspection of radiosondes by plant personnel. An examination of the record shows that while this witness was on direct examination he was asked fully as many questions by the judge as by the Assistant United States Attorney. Moreover, the judge on several occasions, both during direct and cross-examination, ridiculed the witness with respect to his use of words, repeatedly corrected his grammar, and many times admonished him to remember that he should be careful in his statements since he was testifying in a criminal case. As the examination of this witness proceeded the questions and sometimes sharp comments of the judge clearly show that he considered the witness's testimony unworthy of belief.

The Assistant United States Attorney next called a witness who briefly identified certain charts to be used by subsequent witnesses as "chalks" and then called a witness to the stand who identified himself as having been the

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"final inspector of radiosondes" employed by the corporate defendant at its North Dighton plant during the period covered by the indictment.

The direct examination of this witness closely followed the pattern of the direct examination of the government inspector. Toward the end of a day, while still on direct examination, this witness was asked for the date of a conference he had been invited to attend at the plant office with counsel for the corporate defendant. He said at first that he did not remember the date but when pressed for his best recollection he said that he thought the meeting was early in 1958, he believed in February but was not sure. That is to say, he put the date of the conference after the period covered by the indictment. The next morning, while still on direct examination, the witness was again asked if he was certain of the date of the conference and he again said he was not. On being asked once more for his best recollection he said, "Approximately September 1957." The judge then asked the witness if he had talked with government counsel while testifying in the case, and the witness saying that he had, the judge remarked that in a criminal case that was not "correct."

A little while later, on cross-examination by counsel for the corporate defendant, the witness admitted that he had changed his testimony as to the date of the meeting as a result of a conference with one of the Assistant United States Attorneys during the preceding over-night recess. The judge then excused the jury and asked the Assistant United States Attorney involved if he wished to make any statement "as a matter of personal privilege." The latter answered that he was unaware of any reason why he should

not talk with his own witness during a recess called in the course of the witness's direct examination and expressed astonishment that the judge should think that there was any impropriety in his having done so. The judge then ordered the witness to leave the courtroom and the Assistant United States Attorney, again having expressed ignorance of any impropriety in what he had done, the judge said, "You will very soon learn," and addressed the Assistant United States Attorney as follows:

> "You were here and you knew he was on the stand. You knew there was a recess. You know the principle that a witness must be examined in public. You know that, without suggesting for a moment that you offered any improper inducement, tampering with a witness is one of the most dangerous things in connection with a case, and particularly a criminal case, that a person should be left entirely alone during the course of his testimony. You must know that elementary fact and elementary rule."

During further colloquy in the same vein the judge said that he did not mean that counsel for the Government were "personally deliberately" doing something they "knew to be wicked," and that he was not "proposing to take any disciplinary action" against them but was only interested in finding out whether the "situation" was one in which he "must respond to a motion." After more colloquy in the course of which the judge again suggested that the "situation" might require him to act "in response to a motion," counsel for each defendant moved orally for judgment of acquittal. Counsel for the Government strenuously opposed these motions on the ground that the wit-

nesses so far heard were not vital to the case but were primarily intended only to lay the basis for concrete testimony of guilt to follow and that there were many government witnesses in attendance in the courtroom yet to be heard for whose credibility he was ready to vouch. He suggested that the most that should be done would be to strike the testimony of the witness under examination.

At the conclusion of the Assistant United States Attorney's remarks the judge recalled the jury, ordered the witness back to the stand, and opened a statement to the jury as follows:

> "Mr. Foreman and Members of the Jury, before I say anything else, let me make it absolutely clear that counsel for the defendants as well as the Court are persuaded that neither the United States Attorney[2] nor either of his assistants consciously or deliberately violated any canon with which they were familiar. They were acting subjectively in good faith, and I do not mean at any stage of the remarks I am about to make to criticise them in the sense that I believe that they were conscious wrongdoers."

Following this the judge implied that he considered the Assistant United States Attorney's conference with the witness during recess a serious infringement of the defendants' civil rights and that he regarded the testimony of the two principal witnesses so far produced by the Government to be wholly unworthy of belief, saying that both showed on the stand "a lamentable lack of awareness or lack of capacity in connection with their testimonial ob-

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[2] The United States Attorney himself had joined his two assistants in the courtroom during the course of the trial.

ligations" and that the witness then on the stand "has shown either lamentable lack of memory or an extraordinary power of inventiveness."

At the conclusion of his remarks the judge said to the jury that acting in response to the motions for acquittal made by counsel for the individual defendants and the corporate defendant, "I direct you at this stage to return verdicts of acquittal with respect to each of the individuals and with respect to the corporation." The judge then directed the defendants to stand up and announced, "You have been acquitted by direction of the Court and by the Court. Your bail is terminated. You are free."[3]

We cannot be sure whether the judge directed acquittal of the defendants because he thought the testimony of two of the four witnesses put on by the United States at the outset of the trial was not entitled to belief or because he thought the action of the Assistant United States Attorney in talking with a government witness during a recess called while the witness was on direct examination deprived the defendants of some basic civil right. But whether the judge acted as he did for one reason or for the other, or

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[3] On the next day judgment was entered as follows:

"The Defendants, Standard Coil Products Co., Inc., Fong Foo, and Robert Knupp, having been set to the bar to be tried by a jury for the offenses of concealment of material facts and conspiring to conceal material facts in a matter within the jurisdiction of an agency of the United States in violation of 18 U.S.C. 1001 and 371 as charged in 9 counts, and

On September 20, 1960, upon the allowance of motions for acquittal made on behalf of each defendant, it is

ORDERED that each defendant be, and hereby is, acquitted of the offenses charged, and it is

FURTHER ORDERED that each defendant be, and hereby is, discharged."

for both reasons in combination, we think his action was not only plainly erroneous but beyond his jurisdiction.

The testimony of the two principal witnesses to whom we have specifically referred was certainly confused and conflicting. But, although to an appellate court the record of a trial may be "cold," it can nevertheless be clear; and it is clear from the record before us that the confusion and conflicts in these witnesses' testimony was due in no minor part to the trial judge's persistent, sharp and sometimes caustic cross-examination throughout their direct examination.

It is evident that the memories of the Government's witnesses were not entirely reliable, particularly as to details, and it is also evident that they were not masters of the English language. But as every lawyer with trial experience knows, the witness whose memory is clear and sharp, who in court is neither over-awed nor cockily over-confident, and who has the capacity clearly to understand the questions asked and the command of language to answer briefly and accurately is indeed a *rara avis*. Cases can only be tried on the testimony of those who have knowledge of the issues, whoever they may happen to be, and all too often, indeed usually, witnesses, coming as they ordinarily do from the body of the general public, neither think nor speak with the clarity and precision of academicians. For the most part witnesses with only average education and intellectual capacity are the tools with which trial counsel must work as best they can. Moreover, every occupation has its own vernacular. Sailors, doctors, railroad men, engineers, not to omit lawyers, and others too numerous to

mention, more or less unconsciously slip into the vocabularies of their callings. Naturally witnesses can and should be required to explain the words they use. It is hardly necessary, however, to do so with ridicule or caustic criticism, or repeatedly to check a witness's use of words in reasonably common use by reference to the Oxford English Dictionary, or to require strict adherence to the rules of grammar. The bench is not an appropriate rostrum from which to teach the niceties of English grammar and usage.

It may well be that solicitude for the essential rights of an accused requires the trial judge to cross-examine government witnesses when an accused with no capacity to protect his rights insists upon conducting his own defense or when an accused is represented by wholly inadequate counsel. No such situation is before us here, however, for the accused were skillfully represented by able and experienced trial counsel who were very well qualified to preserve their client's every interest. We think it would have been far better had performance of that function been left to counsel. Trial judges must not forget that questions from the bench naturally and properly fall with great impact upon ordinary witnesses and that counsel are reluctant to object to questions asked by a judge for fear of giving offense. There can be no even give and take in court between the judge and counsel for counsel on the floor do not stand on even terms with the judge on the bench.

While performance by the trial judge of his function, indeed duty, to see that the truth is elicited ordinarily requires clarifying questions from the bench, and maybe on occasion sharp warnings, it is not his function or duty to take the conduct of a case away from counsel. Counsel,

as in this case, who sees the examination of his witnesses taken over by the judge and led into matters the witnesses were not intended to cover in their testimony and so opened for cross-examination as to those matters by the other side, finds himself in a most difficult and embarrassing situation. In the first place, it is a delicate matter about which counsel think twice to object to any question asked by a judge. In the second place, if counsel objects to a judge's question on the ground that it leads the witness into matters he was not offered to testify about, counsel runs the risk, exemplified in this case, of comment by the judge before the jury implying that he is seeking to cut off legitimate inquiry. On the other hand, if counsel does not object he soon finds his witness floundering and displaying ignorance and, again as in this case, provoking critical comments by the judge either on the witness's intelligence or on counsel's failure to prepare his case.

We recognize that in the federal courts the trial judge is not relegated to the position of a mere moderator. He has the duty not only to make rulings of law but also to govern the trial to assure its proper conduct. *Quercia* v. *United States*, 289 U.S. 466, 469 (1933). Moreover upon his shoulders rests the duty to see that the trial is conducted with solicitude for the basic and essential rights of the accused. *Glasser* v. *United States*, 315 U.S. 60, 71 (1942). But when the trial judge assumes the role of counsel the adversary system breaks down into confusion worse confounded as the record in this case clearly shows.

This record provides a prime example of the consequences of over zealous participation in the examination of witnesses by the trial judge, for its is clear that the

judge's sharp persistent, sometimes almost badgering, questioning and caustic remarks first made the witnesses wary and over cautious and then confused them into inconsistencies, and in addition disrupted the orderly presentation of the Government's case according to the plan outlined to the jury by the Assistant United States Attorney by taking its witnesses into matters they were not offered to cover in their testimony. Running cross-examination from the bench, particularly during a witness's direct examination, is an innovation in trial practice which definitely does not have the approval of this court.[4]

We are at a loss to understand the basis for the judge's criticism of the Assistant United States Attorney for talking with a Government witness during a recess. We are not aware of any rule of law, "elementary" or otherwise, or any canon of professional conduct forbidding the practice. Of course, as a matter of trial tactics, counsel ordinarily avoid talking with a witness during a recess called while the witness is on the stand so as not to provide opposing counsel with a point to argue to the jury. But tactics are one thing and rules of law and canons of ethics are quite another. There is nothing wrong that we know of in talking with a witness during intervals in his examination in court. Indeed in *Frazer* v. *United States*, 233 F. 2d 1, 2 (C. A. 9, 1956), counsel for the Government was commended for privately reminding a witness of a false statement in her testimony thereby causing her to change her testimony to conform to the truth.

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[4] If cases are to be tried by the judge instead of by counsel, the rules of procedure will have to be drastically revised.

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The Assistant United States Attorney was not guilty of any misconduct or impropriety, and even if he had been it would seem that the most the defendants would be entitled to would be an order of mistrial.[5] *Berger* v. *United States*, 295 U. S. 78 (1935). Moreover, the judge should have allowed the jury to pass on the credibility of the Government's introductory witnesses and allowed the Government to proceed with the presentation of its concrete evidence of the offenses charged. The question remains as to what, if anything, this court can and should do to correct the trial judge's error.

Certainly the judge's error was prejudicial to the United States. But the United States obviously cannot appeal. Nor may it resort to mandamus as a substitute for appeal. The writ is not available "to correct a mere error in the exercise of a conceded judicial power." *De Beers Consolidated Mines, Ltd.*, v. *United States*, 325 U. S. 212, 217 (1945). It is available, however, to correct judicial action which is not mere error but usurpation of power, *id.* One of the writ's two traditional uses "both at common law and in the federal courts has been, in appropriate cases, to confine inferior courts to the exercise of their prescribed jurisdiction." *United States Alkali Export Ass'n, Inc.*, v. *United States*, 325 U. S. 196, 202 (1945). Therefore the distinction to be drawn is between an error in the exercise of a power conferred and an attempt to exercise a power not possessed.

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[5] Conceivably, although we have no occasion to decide and do not decide, a judgment of acquittal might be warranted in the event that deliberate misconduct of Government counsel is so outrageous as not only to render the trial in progress unfair but also to make a fair trial in the future impossible.

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There can be no doubt of the power of the court under Rule 29(a) of the Federal Rules of Criminal Procedure to order the entry of judgment of acquittal, either on its own motion or on motion of a defendant, as to one or more of the offenses charged in an indictment or information "after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses." In spite of the clear wording of the Rule, perhaps, as the Government concedes, although again we do not need to decide and do not decide, judgment of acquittal might properly be entered in some situations even before the close of the Government's case, as, for instance, when the Government's opening statement unmistakably shows that the evidence it proposes to introduce would not sustain a conviction, or when it produces evidence conclusively showing either that it has no case or that the accused has an iron-clad defense. But there is no suggestion of any such situation here, for the judge abruptly terminated the Government's case by ordering the entry of a judgment of acquittal on evidence showing no defense and long before the Government had had an opportunity to show whether or not it had a case; and, moreover, he did so in ignorance of either the exact nature or the cogency of the specific evidence of guilt which Government's counsel said he had available and was ready to present.

Primarily on the basis of two cases to be cited and discussed presently, we think that under the circumstances of the case before us the judge had no power, that is to say, jurisdiction, to terminate the Government's presentation of its case in mid-course by entering judgment of acquittal and that mandamus lies to correct the error.

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In *Ex Parte United States*, 242 U. S. 27 (1916), the Court held that, practice in certain circuits including this one to the contrary notwithstanding, a district judge in the abscence of statutory authority had no power permanently to suspend a mandatory minimum sentence of 5 years for bank fraud and that mandamus lay to require the judge to vacate his erroneous order of suspension.

In reaching this conclusion the Court adverted to the consequences of holding to the contrary, that is, of holding that an inherent judicial power could thwart a legislative determination of sentence saying:

> "[I]f it be that the plain legislative command fixing a specific punishment for crime is subject to be permanently set aside by an implied judicial power upon considerations extraneous to the legality of the conviction, it would seem necessarily to follow that there could likewise be implied a discretionary authority to permanently refuse to try a criminal charge because of the conclusion that a particular act made criminal by law ought not to be treated as criminal. And thus it would come to pass that the possession by the judicial department of power to permanently refuse to enforce a law would result in the destruction of the conceded powers of the other departments and hence leave no law to be enforced."

A later case of the same name, *Ex Parte United States*, 287 U. S. 241 (1932), is more nearly in point. In that case the Court issued its writ of mandamus ordering a district judge to issue a bench warrant, which he had refused to do in the purported exercise of his discretion, for the arrest of one under an indictment "fair on its face" returned by a properly constituted grand jury. The case cited is par-

ticularly significant in that it shows that issuance of mandamus by this court in the present case would be in aid of our appellate jurisdiction, and also shows, the jurisdictional limits of a trial judge's powers in criminal cases and the necessity for issuing the writ to confine trial judges within those limits.

In the first place, since the Court in the case cited above was expressly exercising the original jurisdiction conferred upon it by § 262 of the Judicial Code (the forerunner of present § 1651(a) of Title (28), we, as an intermediate appellate court, can safely rely upon it as direct authority for our issuance of the writ in aid of our appellate jurisdiction. See Chief Judge Magruder's discussion in *In Re Josephson*, 218 F. 2d 174, 177-180 (C. A. 1, 1954). If, in spite of the fact that an accused may ultimately be found not guilty, the Supreme Court of the United States, in the exercise of its ultimate discretionary jurisdiction to review actions of the inferior federal courts by certiorari, has power in its discretion to issue mandamus to a federal district court ordering the arrest of one properly charged with crime by a grand jury, then this court, in the exercise of its direct appellate jurisdiction, must also have discretionary power to issue mandamus to require a district judge, or court, to permit the United States to at least present its evidence of guilt when an accused properly charged with crime has been brought to trial. There is thus no need for us to consider whether authority to issue the writ in aid of our jurisdiction might also be found in *Roche* v. *Evaporated Milk Ass'n*, 319 U. S. 21 (1943), or *La Buy* v. *Howes Leather Co.*, 352 U. S. 249 (1957).

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In the second place the considerations on which the Court relied in *Ex Parte United States*, 287 U. S. 241, 249-251 (1932), for its conclusion that the district judge did not have jurisdiction to deny the Government's petition for a bench warrant for the arrest of one properly charged with crime support our conclusion that the district judge in the situation before us did not have jurisdiction to prevent the United States from going on with the presentation of its evidence of guilt. We have specific reference to the statement on page 250 that a proper indictment returned by a properly constituted grand jury[6] "conclusively" determined the existence of probable cause for holding the accused to answer to a charge of crime and also to the statement on page 249 that the effect of the refusal of the district court to issue a warrant for the arrest of one charged in "an indictment fair upon its face and properly found and returned is equivalent to a denial of the absolute right of the government, as matters stand, to put the accused on trial. . . . The mere statement discloses the gravity and public importance of the question. It is obvious that if a like attitude should be taken by district courts generally, serious interference with the prosecution of persons indicted for criminal offenses might result."

These observations, and others we might quote from the same opinion and the cases cited therein, are pertinent here. If, under the circumstances disclosed by the record before us, a district judge for no good reason can halt the presentation of the Government's evidence in a criminal case and

[6] We can say the same for the indictment in the case at bar. At least there is no suggestion to the contrary and motions to dismiss the indictment were denied by the district judge.

enter judgment of acquittal, the action of the grand jury in returning the indictment would be just as much flouted, and the Government fully as frustrated in the performance of its duty to prosecute persons regularly and properly charged with crime as though the judge at the outset had refused to issue a bench warrant for the arrest of the accused. The action of the trial judge in one situation falls as little short of a refusal to permit enforcement of the criminal law as in the other. See id. at page 250. Though the situations are different they are clearly comparable.

The industry of counsel and our own research has unearthed no case squarely in point. But if a trial judge does not have the power to prevent the arrest of anyone properly accused of crime, as held in the later case entitled *Ex Parte United States,* cited above, or to refuse for no valid reason ever to try a criminal charge as indicated in the earlier case of the same name, also cited above, it seems to us to follow that a trial judge has no power arbitrarily to halt the trial of an accused when the government has only begun to present its evidence of guilt. We see no difference in principle between blocking a criminal trial at the threshold and blocking it when the government has barely had a chance to put its toe in the door.

The question of double jeopardy remains for consideration.

Strictly speaking the defense of double jeopardy is not now before us. We can confidently anticipate, however, that the defense will be raised by the defendants by a plea of *autrefois acquit,* or former acquittal, when they are set to the bar to be tried again. Therefore, since issuance of mandamus, when within our power, is discretionary, and

it would be pointless for us to issue the writ if it were a foregone conclusion that the plea of *autrefois acquit* would be good at another trial, it is appropriate here briefly to advert to the defense of double jeopardy. It will suffice for us to say that from our conclusion that the trial judge had no power, that is to say no jurisdiction, to enter judgment of acquittal, it follows under principles too well established to require citation of authorities that the judgment is void—a nullity—and hence affords no basis for the defense of double jeopardy. See *Mitchell* v. *Youell*, 130 F. 2d 880 (C. A. 4, 1942).

The United States in its application for mandamus has not specifically asked us to order that the case be reassigned for trial before another judge. Nevertheless we shall do so, for we do not see how a judge who has unnecessarily taken it upon himself to cross-examine witnesses not only extensively but also sharply can either listen to their testimony reflectively or weigh their testimony dispassionately.

Mandamus will issue directing that the judgment of acquittal entered in United States v. *Standard Coil Products Co., Inc., Fong Foo and Robert Knupp, designated on the Criminal Docket of the United States District Court for the District of Massachusetts as CR. 60-6-W, be vacated and ordering that the above case be reassigned by that court for trial before another judge.*

ALDRICH, *Circuit Judge*, (concurring). If I agreed with the court that one could not be sure of the reason why the district court ordered the acquittal I would have to disagree with its conclusion on the issue of double jeopardy. Since the subject is of some general importance, I state my reasons.

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I cannot think that a court is "without power," that is, "without jurisdiction,"[1] to order an acquittal in the midst of the government's case on the ground that evidence already introduced is so fatally defective that no jury could be allowed to convict. The court assumes, *arguendo*, that it may sometimes be appropriate for a district court to direct an acquittal prior to the closing of the government's case because of some evidentiary defect, but says it is unnecessary to decide. I do not think one can leave this matter hanging, but, rather, I believe its resolution to be all-important.

Not unnaturally, in view of the fact that the government has no general right of appeal, there is a paucity of authority with respect to the right of the court to acquit for evidentiary defects at any preliminary stage. In *United States* v. *Dietrich*, C.C.D. Neb., 1904, 126 Fed. 676, Circuit Judge (afterwards Mr. Justice) Van Devanter said, at pp. 677-78,

> "Where, by the opening statement for the prosecution in a criminal trial, and after full opportunity for the correction of any ambiguity, error, or omission in the statement, a fact is clearly and deliberately admitted which must necessarily prevent a conviction and require an acquittal, the court may, upon its motion or that of counsel, close the case by directing a verdict for the accused. The court has the same power to act upon such an admission that it would have to act upon the evidence if produced. It would be a waste

[1] The court apparently uses "power" and "jurisdiction" interchangeably. Certainly there is no question here about the district court's jurisdiction over the case and over the defendants. Accordingly, I will hereafter use the term "power."

> of time to listen to evidence of other matters when at the outset a fact is clearly and deliberately admitted which must defeat the prosecution in the end."

I see no reason to say the court there erred in applying this well-recognized civil principle to a criminal proceeding. See *McGuire* v. *United States*, 8 Cir., 1945, 152 F. 2d 577, 580. In like manner, in *United States* v. *Maryland Cooperative Milk Producers, Inc.*, D. C. D. C., 1956, 145 F. Supp. 151, an acquittal was ordered when facts were stipulated during the course of the government's case which the court believed precluded any possibility of criminal liability. See also *United States* v. *Weissman*, 1924, 266 U. S. 377, 379.

In the absence of any contrary authority, it seems inherently reasonable to conclude that at whatever stage a fatal deficiency in the government's evidence irrevocably appears, the court is empowered to acquit.[2] Yet it must follow that if the court can make such a decision *in medias res* when its opinion of the damaging effect of particular facts is correct, it can equally do so when its interpretation is incorrect. If a court truly lacked jurisdiction, that would be one thing, but given power to decide, there must be power to decide erroneously. Therefore the question must be, was the nature of the ruling that the court made

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[2] There is some suggestion in the court's opinion that Fed. Rule of Crim. Procedure 29(a), 18 U.S.C., permitting the court to acquit at the close of the government's evidence and allowing the defendant to move at that time without resting, impliedly indicates that the court may not acquit at any earlier stage. The rule contains, however, no positive prohibition to that effect. I believe the rule merely recognizes a common practice, and encourages it by not restricting the right of the defendant to move. See 5 Moore, Federal Practice ¶50.01 [2] (2d ed. 1951).

here so different that it must be said that the court was entirely without the power to make it.

There can be no doubt that even if a court found no conceded fact, as in the *Maryland Cooperative* case, fatal to the government, but nevertheless was of the opinion that the government's evidence was so unreliable and vacillating[3] as to be utterly unworthy of belief, it could order an acquittal at the close of the government's case. The government could not appeal, no matter how erroneous the court's determination. I cannot think that a court is entirely without power to reach the same conclusion before the last witness has testified. It is not always necessary to eat the whole of an egg to know it is rotten. The fact that the court is obliged to put the defendant to the bar, *Ex parte United States*, 1932, 287 U. S. 241, seems a far cry from saying that it cannot, in a bona fide attempt to weigh evidence introduced, conclude that what it holds to be a vital part thereof is so irretrievably bad that no jury could properly convict.[4]

Suppose here that instead of ordering an acquittal forthwith the court had stated that under the circumstances then disclosed all of the remaining evidence offered by the government must be excluded as irrelevant. Manifestly, the power to exclude evidence as irrelevant exists at all times. The government, perforce, would then have rested, and the court's power to acquit would have become abso-

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[3] The district court here (wrongfully, I agree) asserted that the witnesses continually and fundamentally contradicted themselves.

[4] Even accepting in full the government's suggestion that it is entitled to a trial by jury, such trial traditionally includes the right of the court to conclude that the evidence does not warrant submission. See *Patton* v. *United States*, 1929, 281 U.S. 276, 288.

lute. In what way was the court's ruling (if the unreliability of the evidence was its reason for acquittal rather than government counsel's alleged misconduct) other than that evidence already introduced so fatally infected the case that all further evidence was irrelevant in the sense that it could not cure the defect. To say that this was done without sufficient consideration is not to say that it was done without power. I believe the court has been misled by the relative magnitude of the district court's error into confusing a difference in degree with a difference in kind.

However, I think that a different question is raised by the other possible reason for the acquittal, the conduct of the Assistant U. S. Attorney in speaking to his witness during the recess. Here the court's assumption, *arguendo,* (note 5) is that " a judgment of acquittal might be warranted in the event that deliberate misconduct of Government counsel is so outrageous as not only to render the trial in progress unfair but also to make a fair trial in the future impossible." I find it difficult to imagine circumstances warranting such an assumption. *Cf. Caldwell* v. *United States,* D. C. Cir., 1953, 205 F. 2d 879, 881 n. 11, *cert. den.,* 349 U. S. 930. But in all events I agree with the court that it is totally inapplicable.

It must be conceded that it was within the power of the district court to determine, however erroneously, that the conduct of counsel was improper. But I do not think it follows automatically that the court had power to acquit for that same reason. "A criminal prosecution is more than a game in which the government may be checkmated and the game lost merely because its officers have not played according to rule." *Maguire* v. *United States,* 1927,

273 U. S. 95, 99. When a court acquits in the middle of the government's case because of what it believes to be an incurable defect in the evidence, it has made a judgment on the government's case as a whole. A ruling of misconduct, however, is only a judgment as to the procedure in the particular trial. What corrective steps the court should take after its determination of a procedural error is a separate question. To make the same assumption that the court makes in its opinion, that "deliberate," "outrageous" misconduct which would project its unfairness into a future trial would warrant an acquittal forthwith, does not advance the matter, because that is far from our case. The district court made it abundantly clear that the error, as it considered it, committed by the Assistant U. S. Attorney was based upon ignorance of the court's rule,[5] and was anything but deliberate. Nor was any question of prejudice to the defendants possibly involved. The only testimony which the witness had changed as a result of conferring with counsel was the date of a particular conference. The date was a preliminary matter. Nothing about the conference had been admitted in evidence. The present effect of this new testimony upon the trial was nil. Its future effect was entirely in the control of the court, who could exclude any future evidence relating to this as yet undisclosed conference. Prejudice to the defendants was accordingly nonexistent.

Under these circumstances I do not think the court had any more power to order an acquittal than it would have

[5] An understandable ignorance, since twice before during the trial the court had expressly invited a government witness to confer with counsel during recess about his testimony, and in one instance to "rehearse it with counsel."

had on the basis of some rule of thumb that more than three government questions, asked in good faith, but regarded by the court as irrelevant, had unduly delayed the trial.

While courts can do, and must be permitted to do, unwise and even foolish things, I think there must be some limit to naked, arbitrary power. As against a defendant's right to be free from double jeopardy, there is the interest of the public in the prosecution and conviction of criminals. See, *e.g.*, *Green* v. *United States*, 1957, 355 U. S. 184, 216-19 (Frankfurter, J., dissenting). In some instances this has been permitted to override what, strictly, is a second jeopardy, or at least an extended jeopardy. *Cf. Wade* v. *Hunter*, 1949, 336 U. S. 684, 688-90; cases collected in *United States* v. *Gori*, 2 Cir., 1960, 282 F. 2d 43, 48 (dissenting opinion), *cert. granted* 12/12/60. Whatever may be the correct philosophy of judicial power, I am unwilling to think that such a totally arbitrary act in the course of trial with no semblance of justification behind it,[6] should deprive the government of its day in court. This may be an exceptional ruling, but this is an exceptional case.

Since I think different consequences flow from the two suggested grounds of the district court's acquittal, it is essential to determine, if possible, which one was the actual basis of its action. With all respect, I do not share the court's expressed uncertainty. As soon as it appeared why the witness had changed his testimony the district court excused the jury and asked the Assistant U. S. At-

[6] Unless one wanted to say it was to teach government counsel a lesson for not knowing the rules—which is scarcely a judicial function. It would be doubly inappropriate here in view of the court's prior instructions. See n. 5, *supra*.

torney, "As a matter of personal privilege do you want to make any statement?" The court stated that in talking to his witness counsel had violated an "elementary rule," and that it was "interested in whether this is a situation in which I must respond to a motion." The court then described counsel's conduct as "a violation of civil liberties." Subsequently the court called the jury, stated that counsel were acting "subjectively in good faith [but that] the standards of a criminal prosecution in the United States require a constant awareness of the rights and liberties guaranteed by the United States Constitution." It is true that thereafter the court mentioned the government witnesses' "lamentable lack of awareness or lack of capacity in connection with their testimonial obligations," and discussed the case generally. But it returned at some length to counsel's conference with the witness, discussed extorted confessions, unlawful search and seizure, and "the duty of a court to see that every man gets a fair trial," and concluded, "Bearing in mind these principles, and responding to the motions for acquittal made by counsel . . ., I direct you at this stage to return the verdicts of acquittal. . . ."

It may be that the district court would not have conceived of this "elementary rule" if it had not already been annoyed with the believed testimonial deficiencies of the witnesses, but I have no reluctance in concluding that the reason it granted the motions for acquittal was the same one that caused it to invite them—namely, counsel's violation of the "rule." Accordingly, I concur in the judgment of the court.

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 5755 Original.

In the Matter of

UNITED STATES OF AMERICA,

Petitioner.

ORDER OF COURT

February 2, 1961.

This cause came on to be heard on petition for writ of mandamus and was argued by counsel for petitioner and for intervenors,

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The petition for a writ of mandamus is granted and the writ is hereby issued directing that the judgment of acquittal entered in United States v. Standard Coil Products Co., Inc., Fong Foo and Robert Knupp, designated on the Criminal Docket of the United States District Court for the District of Massachusetts as Cr. 60-6-W, be vacated and ordering that the above case be reassigned by that court for trial before another judge.

By the Court:

ROGER A. STINCHFIELD, Clerk

By /s/ DANA H. GALLUP
Chief Deputy Clerk.

Appendix C

A true copy

ROGER A. STINCHFIELD, Clerk

Attest: By /s/ DANA H. GALLUP
Chief Deputy Clerk

[Cert. cc. Honorable Charles E. Wyzanski, Jr., Clerk
D. C., Mass., and Messrs. Richardson, St. Clair
Angoff.]

APPENDIX D

EXCERPTS FROM THE RECORD OF THE TRIAL PROCEEDINGS

1. Direction by the Court to the jury to return verdicts of acquittal. (Tr. 714-718)

2. Conference at the bench on September 14, 1960 in which the Court recommended that the United States Attorney *nolle prosse* the case against the defendants. (Tr. 370-384)

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1. *Direction by the Court to the jury to return verdicts of acquittal.* (Tr. 714-718)

The Court: Will you call the Jury, and the witness will take the stand.

(The Jury returns to the court room, and the witness résumes the stand.)

The Court. Mr. Foreman and Members of the Jury, before I say anything else, let me make it absolutely clear that counsel for the defendants as well as the Court are persuaded that neither the United States Attorney nor either of his assistants consciously or deliberately violated any canon with which they were familiar. They were acting subjectively in good faith, and I do not mean at any stage of the remarks I am about to make to criticize them in the sense that I believe that they were conscious wrongdoers.

On the other hand, a criminal prosecution is the most solemn proceeding which takes place in a court, and one of the most solemn activities with which man could be

concerned on earth. The standards of a criminal prosecution in the United States require a constant awareness of the rights and liberties guaranteed by the United States Constitution, and a constant sensitivity with respect to the value of an open trial conducted with a full protection of the rights of any individual or any corporation summoned to answer a criminal charge.

In the case before you there have been a number of difficult problems, and I have no question that you have been presented with witnesses who were the best that the government could offer, but they were witnesses who on the stand showed a lamentable lack of awareness or lack of capacity in connection with their testimonial obligations.

Frequently during the trial of this case I have had to do what I never did before in eighteen and one-half years, remind the witnesses of the solemnity of their function, and the necessity that they should recall accurately and state accurately the testimony which they were giving in matters of the utmost significance.

Were I not engaged in such a serious set of remarks to you, I would be tempted to rest upon a story which Chief Justice Wilkins told at the Judicial Conference, somewhat different from the one that I recited to you the other day. He referred to a case tried by Judge Otis Lord of the Superior Court of the Commonwealth of Massachusetts in the middle of the 19th century, and he said that after the most fluctuating kind of testimony by witnesses in that criminal case Justice Lord in addressing the jury said, "I think it would be sufficient if I instructed you that if you believe the witnesses for the government you will convict the prisoner; if you believe the witnesses for the prisoner,

you will acquit him; if, like myself, you do not believe either of them you will then acquit the prisoner because the government has the burden of proof beyond a reasonable doubt."

And though that story may seem to you to be humorous, I think you will also say that it has considerable application to the difficulties which we have faced in this case.

That is not to say that the difficulties were created by the United States Attorney or his assistants. They were faced by them. It is in the atmosphere of this fluctuating testimony that yesterday afternoon we had testimony on a most vital point given by Mr. Rosenholm. You cannot fully appreciate how vital, because you haven't read the text of the indictment and I have not hitherto had any occasion to discuss with you the problem of conspiracy, which is one of the essential elements in a part of this indictment. And you can't know, as I do, that the prosecution was endeavoring to show that a lawyer, together with others not named as defendants, together with the defendants, conspired to defraud the United States, that in this connection the admissibility of the testimony depended to a very considerable extent upon the date of an alleged conference in which the attorney participated. But you did hear that that date was given by this witness, Mr. Rosenholm, on the stand yesterday, and that I declared a recess yesterday afternoon in order that the government might be fully prepared to lay a foundation for the admissibility of the testimony that it relied upon with respect to this alleged conspiratorial conference.

During the recess, and without in any way being conscious of a potential violation of any canon of ethics or any

rule or principle, the Assistant United States Attorneys in this case admittedly conferred with this witness who was on the stand, and the conference with him took place either in the offices of the United States Attorney or in some similar place. It took place this morning before court, not under the supervision of a judge, and without the presence of the defendants or counsel for the defendants.

In this situation the witness took the stand this morning and on this very vital point gave an altered version in which the date now given becomes quite significant and has a connotation and importance which the date he gave yesterday did not have.

He is a witness who already has shown either a lamentable lack of memory or an extrordinary power of inventiveness, as you will recall in connection with the cards where he gave a whole series of answers which he withdrew.

With due regard for the principles of justice under law, I must bear in mind not only what may be correct, but what is fair. In our constitutional system, under our jurisprudence, many things which are true are not allowed to be shown. Examples are a confession extorted by physical coercion; such a confession is not admissible although it may be perfectly correct and the defendant may be guilty. Likewise, information procured by an unlawful search and seizure may be perfectly true and the defendant may be guilty; nonetheless it is well settled that no conviction can be based lawfully upon information unconstitutionally procured by an unreasonable search or seizure.

These principles illustrate the sensitivity of American courts to fair play in connection with every aspect of the criminal law. It is not the duty of a court to see that every

guilty man is punished. It is the duty of a court to see that every man gets a fair trial. The highest public interest is not the punishment of the wicked, but the establishment and maintenance of justice under law.

Bearing in mind these principles, and responding to the motions of acquittal made by counsel for the individual defendants and the corporate defendant, I direct you at this stage to return the verdicts of acquittal with respect to each of the individuals and with respect to the corporation.

(The Court then heard requests of Jurors to be excused.)

The Court: The defendants will stand. (The defendants complied.) You have been acquitted by direction of the Court and by the Court. Your bail is terminated. You are free.

ADJOURNED

2. *Conference at the bench on September 14, 1960 in which the Court recommended that the United States Attorney nolle prosse the case against the defendants.* (R. 370-384)

The Court: The jury is excused.

(The jury leaves the court room at 10.55 a.m.)

The Court: . . .

First of all, I am going to ask Mr. Caner and Mr. Mitchell: is there any other principal Government witness with respect to the kind of items which have been covered by the witness on the stand, Mr. Palliotto?

Mr. Caner: There is one, yes, your Honor.

Appendix D

The Court: Is he one whose credit in your opinon will stand better after examination than this witness' credit?

Mr. Caner: I think his credit will be good, your Honor.

The Court: I didn't ask you that.

Mr. Mitchell: Your Honor, I think that Mr. Palliotto is just a little confused.

The Court: A little confused? This has gone on for two or three days. I am going to tell you that if I were the United States Attorney in this case and my principal witness were testifying as this witness has done I would forthwith nol prosse the case.

Mr. Caner: If the Court please, this witness was put on to testify simply to give explanatory material. This witness was not put on at this stage to testify to any matters concerning the fraud. It may be, and it obviously is, that his explanations have not been as clear as they might be. But, if the Court please, he is not our principal witness by any stretch of the imagination.

The Court: There are all kinds of character in a lawyer. One of them is the kind of character which enables him to realize in what situation a witness for whom he is not responsible has placed his case, and it is the responsibility of the United States Attorney and his assistants to reflect whether the great interests of justice, which are their primary concern, are served by a prosecution which depends upon a witness of the character that this witness has revealed on the stand.

I will take a 15-minute recess for the purpose of enabling the United States Attorney and his assistants to consider

whether the public interest is served by a further prosecution of this case.

(Recess.)

[Jury excused.]

[Conference at the bench at which the following was recorded:

The Court: I note that Mr. Richardson has joined the government counsel, and I am going to undertake very briefly to state to him as well as to other counsel why I have done the, for me, entirely unprecedented thing of asking the United States Attorney to consider whether to nol pros the case at this stage.

The cold record perhaps inadequately conveys the total picture as it has developed in the last few days of testimony, and in particular the testimony of the witness Palliotto, who is on the stand.

A judge ought not to deceive himself into believing that he knows how a jury will act. Yet I feel reasonably confident, and I believe my confidence is shared by Mr. Duwan, the Clerk, who has sat through the trial and who is, like myself, a neutral and a person of some experience in the court, that there is no chance whatsoever that this jury would convict these defendants if a conviction required any credit of Mr. Palliotto.

I make no statement as to whether the defendants are guilty or not guilty, and I will make it clear that I am in no way casting any reflection on the United States Attorney or any of his assistants, including most specifically Mr. Caner and Mr. Mitchell. I am not doubting any of the

proceedings before the Grand Jury. I am looking merely at the situation in which this Court and Jury are presented with the testimony of a man who may intend to tell the truth but seems absolutely incapable of so testifying as to persuade neutral persons that he has a mind with a discriminating capacity to observe, the strength to remember, the skill to narrate, and the total awareness of the proceedings in which he, and more particularly the defendants, find themselves.

If it were not so serious a matter, it would be humorous to refer to the kinds of things which this witness has said. On one occasion he will give an answer in the affirmative, and a few minutes later when the situation is really not changed in any respect he takes a diametrically opposite position. He seems not to realize the ambiguity his testimony has created. He seems to be unresponsive to repeated warnings by the Court that there could be no more serious matter than the offering of testimony in a criminal case, and that the witness should pause and reflect if he is in doubt, but should not plunge himself and the rest of us into a series of confusions.

So far as his narrative ability goes, he has been responsible for some of the most humorous blunders that I remember. He referred to the signals which were being given by Exhibit 1, the radiosonde, as "spurious." What he meant, as it finally developed, was that they were signals which were given on the spur of the moment, that is to say, instantaneous. The misuse of the word "spurious" in a case in which one of the important allegations in the indictment is that there were frauds committed upon the

government in connection with the testing system, rises to a degree of risk to the defendants to which they ought not to have been subjected.

I am not in any way intimating that this was the fault of the United States Attorney or his assistants. It just stands as a dramatic instance of the unawareness of the witness as to what his testimony means in a case like this.

Again a strange misuse of language, which I think did not prejudice, was his reference to "virgin women's hair," by which he meant the hair of a woman which was not dyed.

A witness who has so little understanding of the language and who has so frequently made utterances which have confused the Court, and I feel quite certain the Jury, is a very slender reed on which to make a man's fate depend.

Now, I know I have heard only four days of testimony, and I am aware that sometimes, as Thomas Dewey as District Attorney illustrated, one must secure convictions on the testimony of prostitutes, pimps, and worthless people. One may have no choice but to proceed on the basis of persons of poor character and worse reputation. But in general when such convictions have been secured they have been because though men and women have been worthless outside the court room, they have seemed to be creditable or worth believing in the court room.

I can't feel that any trust could be placed in this witness, and if in the end the Jury did believe this witness, I think it would be almost inevitable that I would have to set aside the verdict as not being a verdict which could be

granted full credit as being a verdict based upon evidence beyond a reasonable doubt.

Mr. Duwan, have I really overstated your position? Never mind whether you agree with every paragraph I have said, but have I overstated your position?

Mr. Duwan: No, not at all.

Mr. Richardson: May I comment briefly before I ask Mr. Caner to comment on the basis of his more detailed knowledge of the government's case?

I think in the first place we should make it clear that this witness was called for a limited purpose not central to establishment that wrongdoing had occurred. As I understand his testimony, it was to have attempted to explain the nature of the tests that were to be used under the terms of the government's contract on procuring these radiosondes.

The government would rely entirely on other witnesses to show that those tests were not carried out, and in fact they were falsified.

We believe, therefore, that whatever the Jury's impression of this witness generally, that its judgment as to whether the defendants are guilty would and should rest upon testimony of witnesses who will testify that under the instructions of the defendants they did not follow the procedures prescribed and that they in fact falsified those procedures.

Would you like to supplement that, Mr. Caner?

Mr. Caner: I would like to say that I think the case could well have proceeded by introduction of the documents, particularly the specification, which set forth the

test procedures, and then the fraud witnesses could have been called. My purpose in calling Mr. Palliotto was to explain just how primarily the testing procedures were supposed to work, because it did not seem to me that by just simply reading the printed document the Jury could understand how the test procedures were supposed to be operated.

The Court: Mr. Caner, you are not on trial. I don't want you to think I have made any criticism of the way you choose to present the matter.

Mr. Caner: I don't infer that. I address myself to the point that this witness' testimony is not material to anything relating to the fraud charged in this case. The witness was called to explain it. He has not done a good job of explaining, I grant you that, but the specifications themselves set up the procedure. I think that at least the way the test was supposed to have been operated has been explained, perhaps not perfectly, but it has been explained, and even if it hasn't been explained it is set forth in the specifications.

This witness was not to be our primary witness. I had not anticipated by any stretch of the imagination that he would take this long. The fraud witnesses are here, they have been here for many days, they are the ones who will prove the case against the defendants.

The Court has not heard one-tenth of the testimony in this case, and none of the fraud testimony. I do not think that this witness' testimony has to be believed in any degree in order for a conviction to stand, because the documents, as I say, do speak for themselves as to the test procedure, although not well enough to instruct the Jury, not knowing the instrument, just how test procedures were conducted.

Therefore, it is my view that the witness' testimony is not material to the fraud, and that I would be derelict in my duty in not proceeding with the case.

Mr. Richardson: I might add that I did keep in fairly close touch with the presentation of this case to the Grand Jury, and would simply like to underline in the light of that degree of exposure to the case that what Mr. Caner says about the importance to the government case of the fraud witnesses who have not yet been heard, is basic, and I therefore feel that to draw a conclusion based upon the testimony of this witness would not fairly give the government an opportunity to present to the Court and Jury the evidence on which the Grand Jury proceeded in charging these defendants.

The Court: I want to make it absolutely clear that I am going to allow the government to go ahead. I want further to make it absolutely clear that neither now nor previously have I intended to suggest that the defendants are innocent or not guilty. Neither now nor previously have I intended to suggest that the Assistant United States Attorney, Mr. Caner, or the Assistant United States Attorney, Mr. Mitchell, or anybody else, has been at fault or negligent, or failed to exercise such professional skill as the case required.

All that I have said is that regardless of what other witnesses testify with respect to the merits of the alleged fraud, I do not believe that there is a chance that this Jury will convict these defendants, and that you can suppose that Mr. Duwan and I have at least sat often enough in criminal cases to know that whether the United States Attorney was innocent or not, whether he was skillful or not, the

impression created is now ineradicable in our view. Isn't that right, Mr. Duwan?

Mr. Duwan: So far.

Mr. Richardson: With full deference to Mr. Duwan, and conceding that a jury asked now to vote—

The Court: I didn't say asked now. I am talking about whether it will be overcome.

Mr. Richardson: I think they may feel when they have heard the fraud witnesses that the perspective that they then have on the testimony of this witness is totally different.

The Court: The unfortunate thing from the government's point of view is that this witness has been on the stand now for four days. No one can overlook the fact that in spite of all instructions to jury, they don't hold their minds in absolute suspension, and no one can think the judges do.

Mr. Richardson: I might say in that connection that it had never been anticipated by the government that a witness called for such a purpose would be on the stand for this length of time, and in our view a great deal of the testimony that has been elicited during that period is not material to the government's case.

The Court: In my view the difficulty there would require me to make a professional comment, which I would rather not do, but I invite you to read the transcript.

Mr. St. Clair: The matter of procedure raises its head. I haven't examined this witness at all on any alleged fraud, because it was represented to me that he would be recalled for that purpose as a government witness. Now, if I understand he is not to be recalled for that purpose, I am going to spend the next couple of days with him on what he alleges

was the fraud, because he was the government man in charge.

The Court: That is quite correct. You were told, as I was told, that the witness would be called twice, once in connection with what was more or less background of the whole testing procedure, and once with respect to specific knowledge of specific fraud.

Mr. Caner: Yes, and we propose to do that, your Honor.

Mr. St. Clair: Then he will be called later with respect to the alleged fraud?

The Court: Yes. I am glad that the transcript is being typed out currently.

Mr. Richardson: I will look at it with interest, your Honor.

The Court: All right, bring the Jury down.]

APPENDIX E

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

CRIMINAL No. 60-6-W

UNITED STATES OF AMERICA

vs.

STANDARD COIL PRODUCTS CO., INC,
FONG FOO, and ROBERT KNUPP

JUDGMENT OF ACQUITTAL

WYZANSKI, *J.* The defendants, Standard Coil Products Co., Inc., Fong Foo, and Robert Knupp, having been set to the bar to be tried by a jury for the offenses of concealment of material facts and conspiring to conceal material facts in a matter within the jurisdiction of an agency of the United States in violation of 18 U.S.C. 1001 and 371 as charged in 9 counts, and

On September 20, 1960 upon the allowance of motions for acquittal made on behalf of each defendant, it is

ORDERED that each defendant be, and hereby is, acquitted of the offenses charged, and it is

FURTHER ORDERED that each defendant be, and hereby is, discharged.

By the Court,

/s/ MIRIAM M. WYNN
Deputy Clerk.

/s/ WYZANSKI
U.S. D. J.

Judgment of Acquittal
entered—September 21, 1960

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No. 61-65

In the Supreme Court of the United States

October Term, 1961

Ford, Bacon & Davis, Petitioners

v.

United States of America

Standard Oil Producing Co., Inc., Petitioner

v.

United States of America

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

[illegible]
Solicitor General

[illegible]
Assistant Attorney General

[illegible]
Special Assistant to the Attorney General

[illegible]
Attorney

Department of Justice, Washington 25, D.C.

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In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 788

FONG FOO AND ROBERT KNUPP, PETITIONERS

v.

UNITED STATES OF AMERICA

No. 789

STANDARD COIL PRODUCTS CO., INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (S. Pet. App. B, 5–29; F. Pet. App. A, 1–22)[1] is not yet reported.

[1] "Tr." refers to the transcript of proceedings in the district court. "S. Pet." refers to the petition of Standard Coil Products Co., Inc., for a writ of certiorari. "F. Pet." refers to the petition of Fong Foo and Robert Knupp for a writ of certiorari.

JURISDICTION

The order of the court of appeals was entered on February 2, 1961 (S. Pet. App. C, 30). Mr. Justice Frankfurter, by orders entered on February 27 and 28, 1961, extended the time for filing of petitions for writs of certiorari to and including March 15, 1961, and the petitions were filed on March 7, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a trial judge has power to order an acquittal, as distinguished from a mistrial, prior to the completion of the government's presentation of evidence and without knowledge of the testimony yet to be heard, because of the trial judge's own view of the credibility of the early part of the testimony, or because of his disapproval of the conduct of government counsel.

2. Whether the court of appeals may issue a writ of mandamus to void such an order.

3. Whether, where a void order of acquittal was entered upon their own motion, the defendants may complain that a new trial would subject them to double jeopardy.[2]

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[2] Question 1 appears in the corporate petitioner's Questions 3, 4, and 6, and the individual petitioners' Question 3.

Question 2 appears in the corporate petitioner's Questions 2 and 5 and the individual petitioners' Question 2.

Question 3 appears in the corporate and individual petitioners' Question 1.

RULE INVOLVED

Rule 29(a), F.R. Crim. P., provides in pertinent part:

> Motions for directed verdict are abolished and motions for judgment of acquittal shall be used in their place. The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses. * * *

STATEMENT

Petitioners were charged in the United States District Court for the District of Massachusetts with falsification, and conspiracy to falsify, tests of radiosondes[3] being manufactured by the corporate petitioner under contract with the Army Signal Supply Agency. The criminal statutes asserted to be violated were 18 U.S.C. 371 and 1001. Motions to dismiss the indictment were denied.

In the opening statement to the jury, government counsel stated that the government would first present evidence explaining the instruments and testing procedures and then evidence of the deliberate falsification of the tests (Tr. of the opening statement by Mr. Caner, pp. 2–8; see also Tr. 30, 180, 155A–43).

[3] These are electronic devices for furnishing weather data designed to be dropped from airplanes in remote places and, while floating to earth by parachute, to transmit continuous radio signals in Morse code indicating the temperature, pressure, and humidity of the air through which they pass (Tr. 26, 28, 36–39).

The first government witness briefly identified three exhibits (Tr. 2–7). The next witness was the Quality Assurance Representative of the Army Signal Supply Agency who had been stationed at the corporate petitioner's plant to supervise inspection of the radiosondes. He described the operation of the radiosondes and the procedures for testing and reporting the tests. During the testimony, the trial judge participated extensively in the questioning (Tr. 2–3, 23, 66, 68–69, 99–100, 100–106, 171–173, 272, 307, 364–369, 394, 509–515, 517). On numerous occasions, he appeared to ridicule the witness for errors of language (*e.g.*, Tr. 92–93, 167, 155A–12, 155A–21) and the Assistant United States Attorney for his manner of proceeding (Tr. 29, 32–33, 58–59, 127, 133, 143–144, 148, 155A–31, 330, 452, 455, 506). The judge repeatedly indicated that he considered the witness' testimony unworthy of belief (Tr. 130, 139, 144, 227–228, 299–301, 322, 369, 402, 435, 442, 562, 564).

In an extensive colloquy before cross-examination of the witness was completed, the trial judge, in the absence of the jury (Tr. 370), urged the government to enter a *nolle prosequi* (Tr. 372–377). Government counsel pointed out that the particular witness was only the first of the array of witnesses and was merely testifying to preliminary explanatory matters (Tr. 377–381). The trial judge stated that, "if in the end the Jury did believe this witness, I think it would be almost inevitable that I would have to set aside the verdict" (Tr. 377). He further stated: "I do not believe that there is a chance that this Jury will convict"

and asked confirmation of this estimate by the court clerk, who replied, "So far" (Tr. 381–392). After this incident, the cross-examination continued (Tr. 384).

After a third witness had briefly testified in identification of certain charts (Tr. 567–598), the government called the corporate petitioner's final inspector of radiosondes to testify (Tr. 599–600). Toward the end of a day, and after conduct by the trial judge similar to his treatment of the examination of the Quality Assurance Representative (Tr. 602–604, 611–613, 625–627, 630, 636–638, 662, 663–664, 666–667, 677–678, 682, 685–686, 689, 706), this witness was asked on direct examination for the date of a conference he had been invited to attend at the plant office with counsel for the corporate defendant. He said at first that he did not remember the date (Tr. 681). When pressed for his best recollection, he said that he thought the meeting was early in 1958, he believed in February, but was not sure (Tr. 681). The next morning, while still on direct examination, the witness was again asked if he was certain of the date of the conference and he again said he was not. On being asked once more for his best recollection he said, "Approximately September 1957" (Tr. 693). The judge then asked the witness if he had talked with government counsel while testifying in the case, and the witness said that he had. The judge remarked that in a criminal case that was not "correct" (Tr. 693–694).

On cross-examination by counsel for the corporate defendant, the witness admitted that he had changed

his testimony as to the date of the meeting as a result of a conference with government counsel during the preceding overnight recess (Tr. 704–706). The judge then excused the jury and asked the Assistant United States Attorney involved if he wished to make any statement "as a matter of personal privilege" (Tr. 707). The latter answered that he was unaware of any reason why he should not talk with the witness during a recess called in the course of the witness' direct examination and denied that there was any impropriety in his having done so (Tr. 707). The judge then ordered the witness to leave the courtroom (Tr. 707). After the Assistant United States Attorney again denied any impropriety in what he had done, the judge said, "You will very soon learn." He addressed the Assistant United States Attorney as follows (Tr. 707–708):

> You were here and you knew he was on the stand. You knew there was a recess. You know the principle that a witness must be examined in public. You know that, without suggesting for a moment that you offered any improper inducement, tampering with a witness is one of the most dangerous things in connection with a case, and particularly a criminal case, that a person should be left entirely alone during the course of his testimony. You must know that elementary fact and elementary rule.

During a further colloquy the judge said that he did not mean that counsel for the government were personally and deliberately doing something they "knew to be wicked," but that he was only interested in finding out whether the "situation" was one in which he

"must act in response to a motion." After more discussion in the course of which the judge again suggested that the "situation" might require him to act "in response to a motion," counsel for each defendant moved for judgment of acquittal (Tr. 710–713).

Counsel for the government opposed these motions on the ground that the witnesses so far heard were not vital to the case but were intended only to lay the basis for concrete testimony of guilt to follow. He stated that there were many government witnesses in attendance in the courtroom yet to be heard. He suggested that the most that should be done would be to strike the testimony of the witness under examination (Tr. 713–714).

At the conclusion of government counsel's statements, the judge recalled the jury, ordered the witness back to the stand, and opened an extensive statement to the jury as follows (Tr. 714):

> Mr. Foreman and Members of the Jury, before I say anything else, let me make it absolutely clear that counsel for the defendants as well as the Court are persuaded that neither the United States Attorney nor either of his assistants consciously or deliberately violated any canon with which they were familiar. They were acting subjectively in good faith, and I do not mean at any stage of the remarks I am about to make to criticise them in the sense that I believe that they were conscious wrongdoers.

Following this, the judge made a statement implying that he considered the Assistant United States Attor-

ney's conference with the witness during a recess to be a serious infringement of the defendants' civil rights and that he regarded the testimony of the two principal witnesses produced by the government to be wholly unworthy of belief. He said that both witnesses showed "a lamentable lack of awareness or lack of capacity in connection with their testimonial obligations" and that the witness then on the stand "has shown either a lamentable lack of memory or an extraordinary power of inventiveness" (Tr. 714–718).

At the conclusion of his remarks, the judge said to the jury that, acting in response to the motions for acquittal made by counsel for the individual defendants and the corporate defendant, "I direct you at this stage to return the verdicts of acquittal with respect to each of the individuals and with respect to the corporation." The judge then directed the defendants to stand up and announced, "You have been acquitted by direction of the Court and by the Court. Your bail is terminated. You are free" (Tr. 718). The next day a written judgment of acquittal was entered (S. Pet. App. E, 46). The judge thereafter denied the government's motion to vacate the judgment of acquittal and to reassign the case for retrial (F. Pet. 11).

The government sought a writ of mandamus in the Court of Appeals for the First Circuit directing that the purported judgment of acquittal be vacated. The court of appeals granted this relief and ordered that the case be reassigned for trial before another judge.

ARGUMENT

I

The basic question in this case is whether a trial judge has power to label as a judgment of acquittal an order which in no sense represents a judgment going to the merits, and by so doing to free the defendants from the necessity of standing trial on the indictment returned by a grand jury. If he has no such power, then it necessarily follows that the court of appeals can by mandamus declare the order void, and that trial of the issue on the merits would not violate double jeopardy. We submit that the court below properly held that the great power of district judges to control the trial of a criminal case does not extend so far as to permit such a usurpation of power as that undertaken by the trial judge in this instance.

A. The trial judge lacked power to enter the judgment of acquittal before the government had even begun to present the substance of its case.

1. There was no power to grant the motion on the ground that the government witnesses were not worthy of belief. An acquittal, as distinguished from other ways of terminating a trial, is normally an absolution of guilt granted on the evidence. Rule 29(a), F. R. Crim. P., *supra*, p. 3, provides that a judgment of acquittal shall be entered "after the evidence on either side is closed" if the evidence is "insufficient to sustain a conviction."[4] The trial judge therefore

[4] Petitioners' reliance (S. Pet. 14–18; F. Pet. 21) on language from *United States* v. *Weissman*, 266 U.S. 377, is misplaced and was properly rejected *sub silentio* by the court of appeals.

[Continued next page]

has no power to acquit until the government's evidence has been presented. Normally, this will be at the close of the government's case although in exceptional circumstances the insufficiency of the evidence may be demonstrated earlier, as where the government's opening statement shows that the evidence it proposes to introduce cannot support a conviction, or where a stipulation by the government shows a conclusive defense. *United States* v. *Maryland Cooperative Milk Producers, Inc.*, 145 F. Supp. 151 (D. D.C.).

No such exceptional situation existed here. The government's evidence to which the judge first objected involved only preliminary matters not necessary to prove the offense alleged (see *supra*, pp. 3, 4). Before directing the acquittal, the trial judge also noted that a witness had changed his testimony concerning the date of a particular conference. The conference was to be one small and unessential portion of the proof of the conspiracy (see *supra*, p. 7). Furthermore, the government had indicated its intention to prove the date of the conference by other wit-

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In *Weissman*, the government sought to proceed in the Supreme Court by writ of error and the decision was that by reason of the specific statutory language such a writ would not lie whether the order there were treated as a quashing of an indictment (as contended by the government) or as a direction of a verdict (as phrased by the trial judge). The further language of Mr. Justice Holmes that an opening by counsel or the offer of evidence is not always necessary to a verdict of acquittal must be considered in the light of the fact that since 1924, when that decision was written, Rule 29(a) has been adopted.

nesses.[5] The trial judge could not possibly have known whether the numerous government witnesses still to be called could repair any earlier weaknesses of testimony—weaknesses which were, indeed, largely matters of credibility for the jury. And in determining whether a judgment of acquittal is warranted, even after the government has had an opportunity to present all its evidence, the judge is under a duty to resolve questions of credibility and draw the inferences favorable to the government. See *Curley* v. *United States,* 160 F. 2d 229, 232–235 (C.A. D.C.), certiorari denied, 331 U.S. 837; *United States* v. *Empire Packing Co.*, 174 F. 2d 16, 18–19 (C.A. 7), certiorari denied, 337 U.S. 959.

The constitutional provision for trial by jury does not concern the defendant alone. Article 3, Section 2, clause 3, states in terms that the trial "shall be" by jury, thereby creating a right in the people generally and in their government to have criminal prosecutions tried. The government's consent is therefore required to waive a jury trial. See *Patton* v. *United States,* 281 U.S. 276, 312; Rule 23(a), F. R. Crim. P.[6] More broadly, this Court in *Ex parte United States,*

[5] The trial judge had himself stated that the conversation could be proved "aliunde" (Tr. 712).

[6] The framers of the Federal Rules of Criminal Procedure, although urged to delete from their preliminary drafts the requirement of what is now Rule 23(a) for consent of the government to waiver of a jury, deliberately refused to do so. See the comments on Rule 21(a) (the present 23(a)) in the comments by members of the bar, circulated to all members of the Advisory Committee (Vols. I and II, mimeographed (1943)). See also Stewart, *Comments on Federal Rules of Criminal Procedure*, 8 John Marshall L.Q. 296, 301 (1943).

287 U.S. 241, 249, upheld the "absolute right" of the government, as the representative of the public, "to put the accused on trial"; and in *United States* v. *Thompson*, 251 U.S. 407, 415, the court overruled an "assertion of the judicial discretion * * * incompatible with * * * the right of the Government to initiate prosecutions for crime * * *."

Without presentation, in some form, of the whole of the government's evidence, an acquittal on the evidence is a usurpation of power. The distinction is not, as the individual petitioners would have it (F. Pet. 21), between error and outrageous error, but is instead, as the court of appeals held (S. Pet. App. B, 12a, 16a, 17a), the distinction between an erroneous decision in a matter properly before the trial court and a decision made long in advance of power to make a decision at all.[7]

[7] Petitioners claim (S. Pet. 16, 19; F. Pet. 25) a conflict with *Heath* v. *United States*, 260 F. 2d 623 (C.A. 9). That case, however, involved a dismissal of the indictment, and not, as here, a judgment of acquittal. Obviously there was power to order such a dismissal at the outset of the trial, since it does not turn upon the factual question of guilt but upon total "inability of the prosecution to proceed to trial" (*id.* at 632). The court's remark that the order was equivalent to a judgment of acquittal, like its analogizing of the order to one under Rule 48(b), F.R. Crim. P. (failure to prosecute), was merely in reference to the similarity of all three types of order in not being directly appealable by the government.

The corporate petitioner's efforts (S. Pet. 18) to analogize, in addition, the loss of records in *Heath* to the circumstances here must fail for the dual reason that no critical loss of records occurred (Tr. 508–509, 523–542) and no such facts were relied upon in the purported acquittal. See *United States* v. *Apex Distributing Co.*, 270 F. 2d 747 (C.A. 9), where the court of appeals said: "Since this reason [government fail-

2. The trial court also lacked power to direct a judgment of acquittal because of the purported misconduct of government counsel. Ordinarily a district court has no power to order a judgment of acquittal without an adjudication on the merits of guilt or innocence. The proper remedies for misconduct are to declare a mistrial and to discipline the attorney. The only exceptions which we can imagine involve either misconduct by the government which prevents a fair trial from ever being held (for example, where a key defense witness is deported to prevent him from testifying) or the government's deliberate refusal to obey a valid court order. Thus, a dismissal may result from the government's refusal to obey an order to produce documents which may be necessary for the defense to present its case adequately. *Jencks* v. *United States*, 353 U.S. 657, 672.[8]

Neither situation exists here. The trial judge himself specifically stated that government counsel had not engaged in any deliberate misconduct (see *supra*, pp. 6, 7). Actually, as the court of appeals held (see S. Pet. App. B, 15, 16), there was no misconduct at all. The trial judge himself had earlier suggested to a government witness that he "rehearse" his testimony

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ure to produce documents] has nothing to do with the merits of the criminal actions, it was wholly inappropriate to dismiss them 'with prejudice'" (*id.* at 750).

[8] Congress, however, provided in 18 U.S.C. 3500 the lesser remedy of striking the testimony of the witness from the record unless the court determines "that the interests of justice require that a *mistrial* be declared" (emphasis added).

with counsel (Tr. 111). No American decisions, canons of bar associations, or other authority have been disclosed prohibiting discussion between counsel and a witness. A lawyer may even "properly" interview a witness for the opposing side, the test being, of course, whether the witness is induced to lie on the witness stand. American Bar Association, *Canons of Professional Ethics,* Canon 39; see also Drinker, *Legal Ethics* (1953), 85; *Capitol Cab Corp.* v. *Anderson,* 85 N.Y.S. 2d 767, 770–771, affirmed, 100 N.Y.S. 2d 39. Indeed, it would have been improper for counsel to have left standing the witness' incorrect estimate of the date, when he knew it to be wrong. See *Napue* v. *Illinois,* 360 U.S. 264, 269.

3. We are forced to the conclusion, therefore, that this case involves an extraordinary aberration—an assertion of non-existent power which lacked legal significance. The trial judge's action was substantially the same as if he had walked into the court room on the first day of trial and directed an acquittal without further ado. And since the judgment of acquittal had no foundation in legal power, it was a nullity.

B. Under these circumstances, the court of appeals had power to vacate the order of acquittal by writ of mandamus. In *United States* v. *Smith,* 331 U.S. 469, this Court granted a writ of mandamus directing the district court to vacate its order granting a new trial *sua sponte,* because the order was untimely and therefore beyond the court's power. See also *La Buy* v. *Howes Leather Co.,* 352 U.S. 249, 256; *Beacon Theatres* v. *Westover,* 359 U.S. 500, 511. In *Ex parte*

United States, 287 U.S. 241, 245–249, this Court itself issued a writ of mandamus—without even requiring that the government first seek relief in the court of appeals—which directed the district judge to set aside an order refusing to issue a bench warrant and to issue the warrant. The Court noted that the district judge's conduct was "equivalent to a denial of the absolute right of the government, as matters stand, to put the accused on trial" (*id.* at 249). The Court also stated (*id.* at 246):

> * * * *McClelland* v. *Carland*, 217 U.S. 268, 280, laid down the general rule applicable both to this court and to the circuit courts of appeals, that the power to issue the writ under R.S. § 716 is not limited to cases where its issue is required in aid of a jurisdiction already obtained, but that "where a case is within the appellate jurisdiction of the higher court a writ of mandamus may issue in aid of the appellate jurisdiction which might otherwise be defeated by the unauthorized action of the court below" [citing authorities]. * * *

See also *Ex parte United States*, 242 U.S. 27. Similarly, here the order of acquittal before the government had had any real opportunity to prove its case effectively prevented the government from putting the accused on trial. And the court of appeals could properly issue the writ in order to protect its ultimate power to review the case upon a proper appeal that would be unclouded by a purported order of acquittal which the trial judge had no authority to enter.

C. Petitioners' chief reliance is upon the claim that a new trial will subject them to double jeopardy. This

issue is closely related to the question before the Court in *Gori* v. *United States*, No. 486, this Term—whether a defendant can be retried following a mistrial erroneously declared by the district judge *sua sponte*. Consequently, the Court might wish to hold this petition pending the outcome of the *Gori* case.

It should be noted, however, that the instant case is significantly different from *Gori* v. *United States* because here petitioners, who were represented by counsel, moved for the very judgments of acquittal which the trial court erroneously granted. Petitioners specifically requested the order of the court which interrupted their trial. True, they undoubtedly hoped to secure a judgment which, unlike a mistrial, would bar ever putting their guilt in issue, but having themselves invited the action that was beyond the power of the trial judge, and having themselves thereby obtained the untimely and unlawful interruption of the first trial, they cannot now complain of the consequences of the invitation.[9]

II

Although the issues in this case are novel, and some of them are not without difficulty, there is no pressing

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[9] The corporate petitioner also complains of the portion of the mandamus order which directs that the case be reassigned to another trial judge. Such an order clearly lies within the power of the court of appeals in aid of its power to issue a writ of mandamus under 28 U.S.C. 1651(a). See *United States* v. *Malmin*, 272 Fed. 785, 792 (C.A. 3); *American Chain and Cable Company* v. *Federal Trade Commission*, 142 F. 2d 908, 912 (C.A. 4); *Schwab* v. *Coleman*, 145 F. 2d 672, 678 (C.A. 4). In *Calcaresi* v. *United States*, 348 U.S. 961, this Court itself, in the exercise of its supervisory powers, reversed convictions and remanded the cause for retrial before a different judge.

necessity for the intervention of this Court. Any problems of judicial decorum appear to have been satisfactorily resolved within the First Circuit. And the very novelty of the legal issues suggests the inappropriateness of certiorari.

Neither the court below nor either party has been able to discover any case in which a trial court has acquitted a defendant because the government's witnesses were unconvincing, where the court had not heard even the principal government witnesses and had no knowledge of the testimony they would give. Similarly, no case has been found where a trial court has ordered acquittal, as contrasted to a mistrial, because of admittedly unintentional and isolated misconduct (even assuming *arguendo* that misconduct were involved here) of the prosecutor. Thus, while the issues presented by petitioners may superficially appear to be important, they in fact involve a unique situation in Anglo-American jurisprudence which lacks the general importance that would call for further review. There is not the slightest reason to suppose that the case will ever be repeated.

These circumstances might not be sufficient for a denial of certiorari if there were a showing that petitioners were in danger of suffering substantial and irreparable injury. But at this stage petitioners are faced with nothing more serious than the inconvenience of a new trial. If they are acquitted, the issues which they raise will be moot. If, on the other hand, they are convicted, all the issues raised now can properly be raised upon review of the conviction.

Therefore, if anything to be decided in *Gori* v. *United States* suggests that petitioners were subjected to double jeopardy, they will have full opportunity to seek protection initially in the courts below, and ultimately in this Court.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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IN THE

Supreme Court of the United States

October Term, 1962

No. 780

STANDARD COIL PRODUCTS CO., INC.,
Petitioner,

—against—

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

REPLY BRIEF OF PETITIONER

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—against—

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

REPLY BRIEF OF PETITIONER

I

It is difficult to understand the government's position that a review by this Court is not warranted when the government itself asserts (a) that the issues in this case are closely related to the question before this Court in *Gori* v. *United States*, No. 486, this Term (Br. in Opposition, pp. 15-16), (b) the issues in this case are novel and not without difficulty (Br. in Opposition, p. 16), and (c) that the decision of this Court in *United States* v. *Weisman*, 266 U. S. 377 (1924), has been in effect overruled by Rule 29(a) of the Federal Rules of Criminal Procedure with respect to the

power of a federal trial judge to direct a verdict of acquittal at any stage of the proceeding if he deems the evidence insufficient (Br. in Opposition, pp. 9-10).

We respectfully submit that these contentions of the government demonstrate the serious and important issues in this case which should be decided by this Court.

II

The government's own arguments in support of its position that the trial court did not have the "power" to direct a verdict of acquittal after eight days of trial, show the general importance of this case and its far-reaching implications in the administration of criminal justice.

The government argues that it has a constitutional right to a trial by a jury in a criminal action and that without presentation "of the whole of the government's evidence an acquittal on the evidence is a usurpation of power" (Br. in Opposition, p. 12), and that "even after the government has had an opportunity to present all its evidence, the judge is under a duty to resolve questions of credibility and draw the inferences favorable to the government" (Br. in Opposition, p. 11).

Apparently the government is here asserting for itself the right in a criminal case to seek review and reversal by collateral attack of any action by a trial judge which erroneously precludes the government from presenting its evidence and perhaps even the erroneous ruling of a federal trial court in directing a verdict of acquittal after the government rests.

III

The government appears to be arguing that an erroneous ruling is beyond the power of a trial judge in a criminal proceeding and that such an erroneous ruling retroactively nullifies the jurisdiction of the court, thereby making the entire proceeding void.

The government significantly makes no mention in its brief that the trial judge did have jurisdiction of the case. Moreover, the government's brief acknowledges that there is "power" in a trial judge to direct a verdict of acquittal before the close of the government's case if the trial judge deems the evidence insufficient. The government concedes that under certain circumstances, such as "where the government's opening statement shows that the evidence it proposes to introduce cannot support a conviction" (Br. in Opposition, p. 10), a trial judge has the power to direct a verdict of acquittal. If the trial judge is in error in finding the government's opening statement insufficient, does this "error" cause the trial judge to lose the "power" to make such assessment of the government's opening statement so that his decision can be reviewed and reversed by collateral attack? If, as the government apparently concedes, a trial judge has the "power" to assess the government's opening statement and direct a verdict of acquittal if he believes it insufficient, then the trial judge below must have the "power" to direct a verdict of acquittal after listening to the government present its case for eight days.

IV

The government in discussing the basic constitutional issue of double jeopardy here presented, requests that the

Supreme Court "hold this petition" (Br. in Opposition, p. 16) pending the outcome of *Gori* v. *United States*, No. 486, this Term, because the instant case is "closely related" (Br. in Opposition, p. 16) to the *Gori* case.

The government, in the *Gori* case, in opposition to the petition for certiorari, urged that the trial judge must have "broad discretion" and that the "trial judge must be the ultimate arbiter" even though he acts with "questionable judgment" in terminating the trial. *Gori* v. *United States*, No. 486, this Term, Br. in Opposition, pp. 4, 7. In the present case the government argues that the trial judge should not be the final arbiter in determining how and when to terminate a criminal case.

V

The government argues against granting certiorari at this time, on the one hand, by suggesting that the Supreme Court might wish to hold this petition pending the outcome of *Gori* v. *United States*, because the two cases are closely related (Br. in Opposition, p. 16). On the other hand the government, at page 17 of its brief in opposition, argues that certiorari should not be granted because the issues presented by the petitioner "involve a unique situation in Anglo-American jurisprudence which lacks the general importance that would call for further review," and that "there is not the slightest reason to suppose that the case will ever be repeated."

It is respectfully submitted that the very relationship to the *Gori* case, acknowledged by the government, and the apparently inconsistent arguments used by the government in opposing certiorari in the *Gori* case and in the instant

case, add strong reasons for granting certiorari herein and for hearing argument in both cases at the same time.

The "unique" element in this case is the successful invocation by the government in a criminal case of the jurisdiction of the Court of Appeals in a mandamus proceeding, where no appeal lies, and the reversal of a judgment of acquittal.

It is respectfully suggested that the government's contention that there is not the slightest reason to suppose that this case will ever be repeated, is the opposite of what may be anticipated. If the decision below is allowed to stand, it will open a Pandora's box of mandamus proceedings. Every time a trial judge precludes any of the prosecution's evidence, every time he limits or criticizes an over-zealous government attorney, every time he sets aside a jury verdict of guilty and directs judgment of acquittal, his action will be subject to review and reversal.

VI

The government, at page 17 of its brief, argues that the petition should not be granted at this time even if double jeopardy does exist since "at this stage petitioners are faced with nothing more serious than the inconvenience of a new trial." Nothing more serious indeed! In the words of Justice Gray, in *United States* v. *Ball*, 163 U. S. 662 (1896), at page 169:

> "The Constitution of the United States, in the 5th Amendment, declares: 'Nor shall any person be subject to be twice put in jeopardy of life or limb.' *The prohibition is not against being twice punished, but against being twice put in jeopardy;* and the ac-

cused, whether convicted or acquitted, is equally put in jeopardy at the first trial." (Emphasis added.)

Thus, whereas the government cavalierly dismisses as a mere "inconvenience" the injustice of subjecting the defendants to the fear, harassment and expense of a second criminal trial, the Founding Fathers deemed it important enough to provide against being put through such a trial for the second time to include it in the Fifth Amendment to the Constitution.

CONCLUSION

It is respectfully submitted that the petition for writ of certiorari should be granted, that the argument in No. 486 should be postponed, and that Nos. 788 and 789 should be set for argument immediately following No. 486.

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No. 64

IN THE

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OCTOBER TERM, 1960

FONG FOO AND ROBERT KNUPP,

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v.

UNITED STATES OF AMERICA

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PETITIONERS' REPLY BRIEF

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 788

FONG FOO AND ROBERT KNUPP,

Petitioners,

v.

UNITED STATES OF AMERICA

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITIONERS' REPLY BRIEF

The absence of action by the Court on the petition for certiorari herein indicates that the Court may have adopted the suggestion, made in the Government's Brief in Opposition (p. 16), that the Court "hold this petition pending the outcome of the *Gori* case." We do not quarrel with such action since, as we noted in our petition, a reversal in *Gori* will necessarily require a reversal in this case.

The Court's apparent decision to decide the *Gori* case before deciding this one, however, raises the question of how the present case should be disposed of in the event *Gori* is affirmed. As we pointed out in our petition, an affirmance in *Gori* would certainly not mean that the result in the present case should also be affirmed, since there are issues raised here which are not present in *Gori*.

At the time we filed our petition for certiorari, we did not

know what arguments the Government would advance in *Gori*. Having now read the Government's brief and heard the Government's oral argument in that case, we are persuaded that an **affirmance** in *Gori* on the grounds urged by the Government would require a **reversal** in this case. We would like, therefore, to take this opportunity to examine the Government's argument in *Gori* as it relates to the present case.

The starting point of the Government's argument in *Gori* is that the modern concept of double jeopardy "represents an amalgam of two distinct ideas having different origins and history." (p. 5) The first of these is the ancient common law principle that a defendant who had once been convicted or acquitted could not be tried again. The second is the equally ancient but now obsolete doctrine that once a jury was impanelled in a criminal case it could not be discharged until it reached a verdict. This second principle, the Government contends, was not designed to protect the defendant, but was based on the mystical motion that the particular jury selected to hear the particular case was divinely endowed with ability to reach a correct verdict.

The Government argues that the first principle is still "a rigid and absolute command," but that the second principle, which was modified long ago, should now be replaced by a flexible approach, under which a jury can be discharged in the discretion of the trial judge, and a defendant tried again, unless in all the circumstances it would be "oppressive" to subject him to another trial. On this basis, the Government contends that the second trial of *Gori* was proper, and did not violate his constitutional rights.

In short, the Government bases its entire argument in *Gori* on the fact that Gori was not acquitted at the first trial. But the defendants in the present case *were* acquitted. It seems to follow, therefore, that if the Government is sustained in *Gori,* the decision below in the present case should be reversed.

That the distinction between a second trial after a mistrial and a second trial after an acquittal is the entire basis of the Government's position in *Gori* can best be demonstrated by quoting some excerpts from the Government's brief on the merits in that case. On page 9, at the very beginning of its argument, the Government states:

> "There was no adjudication on the merits, and the trial judge did not purport to find the imagined misconduct so serious as to justify a judgment of acquittal. Yet petitioner insists on the right which would flow from a valid judgment of acquittal—the right not to be tried again for the same offense."

This statement implicitly concedes that if the judge had "purported" to find the "imagined misconduct" of the prosecutor serious enough to justify an acquittal, then Gori could not be tried again. That, of course, is precisely what happened in the present case.

After reviewing the history of double jeopardy at common law and in the various states, the Government concludes that "the plea of a previous but uncompleted trial, unlike the pleas of *autrefois acquit* or *convict,* was never deemed an absolute bar to a second trial." (p. 20) In the present case, of course, a plea of *autrefois acquit* would be available to the defendants on a second trial, and it follows from the Government's argument that this plea would be "an absolute bar."

In discussing the case of *United States* v. *Perez,* 9 Wheat. 579, upon which the petitioner in *Gori* relies, the Government argues:

> "The *Perez* opinion seems clearly to have adopted what later became the English view that, while as a matter of practice the power to order a discharge ought to be sparingly exercised, even an erroneous discharge would not operate to bar a second trial, for so long as the defendant 'has not been convicted or acquitted,' he 'may again be put upon his defence.' " (p. 21)

Here again, the plain implication is that a defendant who *has* been acquitted cannot "again be put upon his defence."

In the section of its brief entitled "the conclusions to be drawn from the historical development," the Government summarizes its position as follows:

> "The meaning that has been given to the double jeopardy clause can best be explained, we think by recognizing that the clause is not monolithic but embodies a variety of prohibitions. Its first, and historically most unquestionable, meaning is to give constitutional status to the common pleas of *autrefois acquit* and *autrefois convict*, and **in that meaning, no doubt, it is a rigid and absolute command.** In its application to mistrials, however, the historical antecedent is quite different. . . . In short, **however absolute the Fifth Amendment may be in the prohibition of a second trial after acquittal** or conviction, its qualified prohibition of mistrials is of a very different order and expresses, not a technical rule, but a basic requirement of fairness and a broad protection against oppression not readily confined within a verbal formula." (pp. 26-7, emphasis added.)

We are not persuaded that this distinction is as important as the Government claims. We agree with the petitioner in *Gori* that the protection against double jeopardy precludes a second trial even if the first trial was terminated without either an acquittal or conviction, so long as the termination was without the defendant's consent or without any manifest necessity. But we fully agree with the Government that the constitutional prohibition against a second trial after an acquittal is a "rigid and absolute command."

There is yet another sense in which the Government's argument in *Gori* would, if sustained, require a reversal in the present case. In answer to the petitioner's argument in *Gori* that a new trial is permissible only if the first one was ter-

minated on the defendant's motion or for reasons of manifest necessity, the Government argues that this rule would "effectively eliminate the judge's right to control the conduct of the proceedings." (p. 37) The Government points out that the trial judge has always been vested with a broad power and responsibility to take such action as is necessary to assure to a criminal defendant a fair trial. If the unavoidable result of granting a mistrial when circumstances make the continuation of the trial unfair would be to preclude a second trial, the Government contends, the trial judge may often be inclined to lean over backward in favor of the prosecution.

It is no answer, the Government says, to assert that the defendant can waive his right not to be tried again by moving for a new trial. In the first place, the defendant may find it advantageous to wait for the verdict, and if the verdict is unfavorable seek a new trial by appealing. Also, difficult problems would be presented where there is more than one defendant, but only one moves for a new trial. Finally, the Government contends, the "waiver" doctrine is an unsatisfactory way of dealing with the problem, since "the result would be to force the defendant to choose either to accept an unfair trial or 'consent' to a second trial—i.e., to sacrifice his purported constitutional right not to be tried again as the price of preserving his admitted constitutional right to a fair trial." (p. 40).

To avoid these conceptual and practical difficulties, the Government argues, it is necessary to hold that the right to declare a mistrial is part of the trial judge's power to assure a fair trial, and does not require a motion by the defendant. Even if that power is exercised erroneously, the Government says, there should be no bar to a second trial unless a second trial would constitute "oppressive action." In that circumstance, but only in that circumstance, the mistrial should be considered the "equivalent" of an acquittal.

In short, the Government argues in *Gori* that trial judges have the power to terminate a trial when they conclude, correctly or incorrectly, that the prosecution has engaged in misconduct of a sort which would make continuation of the trial unfair. Thus, the trial judge could—as he did in *Gori*—order the defendants to be tried again. If the defendant objects, as he did in *Gori*, that this is double jeopardy, that objection should be sustained or denied on the basis of whether the second trial would constitute "oppressive action."

It follows from this argument that when a judge observes what he considers to be misconduct by the prosecution, he must determine whether such misconduct is of sufficient magnitude to require termination of the trial. If he decides that it is of such magnitude, he must order a mistrial, irrespective of whether or not the defendant has moved therefor.

But what if the judge believes, not only that the misconduct of the prosecution has been so serious that the trial should not be permitted to continue, but that in view of all the circumstances of the case it would be "oppressive action" to subject the defendant to another trial? The necessary implication of the Government's argument is that in those circumstances the judge has the power to grant a judgment of acquittal, since to subject a defendant to the oppressive action of a second trial would violate his constitutional protection against double jeopardy, and to continue the first trial would violate his right to due process.

That, of course, is precisely what happened in this case. The trial judge found that the prosecutor had engaged in serious misconduct which made continuation of the trial impossible. The correctness of this determination, according to the Government's own argument in *Gori*, cannot be challenged. In the present case, unlike *Gori*, the judge concluded that the circumstances of the case warranted an acquittal. Plainly, if the Government's argument in *Gori* is

correct, he had the power to make that decision. Yet, once that power is established, there is no further dispute in the present case. The sole question here is whether the trial judge had the power to grant an acquittal. Thus, if the Government's position in *Gori* is sustained, the decision of the Court of Appeals in the present case must be reversed.

We wish to make one final observation. While even the Government concedes that an appellate court cannot review the propriety of a judgment of acquittal once it is established that the trial judge had the power to grant it, it is noteworthy that under the criterion suggested by the Government in *Gori*, the trial judge in the present case had no choice, if he believed that the prosecutor had engaged in misconduct, but to enter an acquittal.

As we pointed out in our petition for certiorari, the trial in this case had been going very well indeed from the point of view of the defendants. The prosecution's witnesses had evidenced considerable confusion, uncertainty, and general unreliability, and the trial judge had plainly indicated that if the jury brought in a verdict of guilty, he would probably set it aside. (Tr. 377) Thus, it is highly probable that the defendants would have been acquitted, either by the judge or by the jury, had the trial been permitted to continue. At the very least, it is clear that the judge would not have permitted them to be convicted. The judge, however, decided that in view of the unreliability of the Government's witnesses and what he believed to be the misconduct of the prosecutor, he could not permit the trial to continue. The Court of Appeals suggested that the appropriate action at that point would have been a mistrial. But if the argument of the Government in *Gori* is correct, even if the judge had granted a mistrial, the defendants could not have been tried again. For surely, to terminate a trial which was going as well as this one was, and then to require the defendants to be tried again, thereby giving the prosecutor a new chance,

would constitute precisely the kind of "oppressive action" which the Government in *Gori* concedes would be unconstitutional.

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No. 64

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

FONG FOO AND ROBERT KNUPP,

Petitioners,

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR PETITIONERS

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OPINIONS BELOW

There was no formal opinion of the District Court. The opinion of the Court of Appeals (R. 45) is reported at 286 F. 2d 556.

JURISDICTION

The Judgment of the Court of Appeals was entered on February 2, 1961 (R. 65). On February 27, 1961, Mr. Justice Frankfurter extended the time for filing a petition for certiorari herein to and including March 15, 1961 (R. 66). The petition was filed on March 7, 1961, and granted on June 19, 1961 (R. 67-68). This Court has jurisdiction under 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED

On a petition for mandamus brought by the United States, the court of appeals reviewed the record of a criminal trial,

found that the trial judge "exceeded his power" in entering a judgment of acquittal, and ordered that the defendants be brought to trial again before another judge. The questions presented are:

1. Whether the double jeopardy clause of the Fifth Amendment protects the defendants against a second trial after they have been acquitted by a court of competent jurisdiction in proceedings free of fraud and collusion, irrespective of whether the trial judge exceeded his power in rendering the judgment of acquittal.

2. Whether the double jeopardy clause of the Fifth Amendment protects the defendants against a second trial even if the judgment of acquittal could be considered void and treated as if it had been an order of mistrial, since a mistrial order in the circumstances of this case would have been prejudicial to the defendants.

3. Whether a court of appeals has jurisdiction to review or set aside a judgment of acquittal on petition for mandamus.

4. Whether a trial judge has power to enter a judgment of acquittal before the prosecution has rested when he believes such action is warranted because of defects in the testimony already presented and because the prosecuting attorney has engaged in what the judge considers improper conduct.

STATUTES, CONSTITUTION, AND RULE INVOLVED

The Fifth Amendment to the Constitution of the United States provides in pertinent part as follows:

> "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . ."

The statute describing the situations in which the Government may appeal in criminal cases, 18 U.S.C. § 3731, reads in pertinent part as follows:

> "An appeal may be taken by and on behalf of the

United States from the district courts direct to the Supreme Court of the United States in all criminal cases in the following instances:

"From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof, where such decision or judgment is based upon the invalidity or construction of the statute upon which the indictment or information is founded.

"From a decision arresting a judgment of conviction for insufficiency of the indictment or information, where such decision is based upon the invalidity or construction of the statute upon which the indictment or information is founded.

"From the decision or judgment sustaining a motion in bar, when the defendant has not been put in jeopardy.

"An appeal may be taken by and on behalf of the United States from the district courts to a court of appeals in all criminal cases, in the following instances:

"From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof except where a direct appeal to the Supreme Court of the United States is provided by this section.

"From a decision arresting a judgment of conviction except where a direct appeal to the Supreme Court of the United States is provided by this section.

"The appeal in all such cases shall be taken within thirty days after the decision or judgment has been rendered and shall be diligently prosecuted."

* * * *

The "all writs" section of the Judicial Code, 28 U.S.C. § 1651 (a), upon which the court of appeals relied for jurisdiction to issue a writ of mandamus in this case, provides as follows:

"The Supreme Court and all courts established by

Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

* * * *

Rule 29 (a) of the Federal Rules of Criminal Procedure, dealing with motions for judgment of acquittal, provides as follows:

"Motions for directed verdict are abolished and motions for judgment of acquittal shall be used in their place. The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses. If a defendant's motion for judgment of acquittal at the close of the evidence offered by the government is not granted, the defendant may offer evidence without having reserved the right."

* * * *

STATEMENT

Fong Foo and Robert Knupp, petitioners herein, together with their employer, Standard Coil Products Co., Inc., petitioner in No. 65, were brought to trial before Judge Wyzanski of the United States District Court for the District of Massachusetts on an indictment charging them with having falsified and concealed, and conspired to falsify and conceal, material facts in a matter within the jurisdiction of a Government agency, in violation of 18 U.S.C. §§ 371, 1001 (R. 6). A jury was empaneled and sworn, and the Government began to present its case. On the eighth day of the trial, the judge, on motion of the defendants, entered a judgment of acquittal (R. 37).

On petition for mandamus filed by the Government, the United States Court of Appeals for the First Circuit set

aside the judgment of acquittal, and directed that the defendants be brought to trial again before another judge (R. 65). Petitioners were permitted to participate as intervenors in the mandamus proceeding, and have brought the case here on petitions for certiorari, which were granted by this Court on June 19, 1961 (R. 67, 68).

The District Court Proceedings

The offenses with which the defendants were charged related to the testing of "radiosondes," which Standard Coil produced for the Government. A radiosonde is a device which is used to gather weather data. When dropped by parachute from an airplane, it transmits radio signals which show the temperature, pressure, and humidity of the air through which the radiosonde passes.

The contracts under which these radiosondes were produced required Standard Coil to test samples, selected by a Government inspector, by recording on tape the signals produced by the radiosonde under specified test conditions. These tapes were then submitted to the inspector. The indictment alleged that the defendants conspired to falsify, and did falsify, certain of these tests, by recording the signals from the radiosondes not under the conditions called for by the inspector, but under whatever conditions would make the radiosonde produce the desired signals. It also alleged that the defendants concealed, and conspired to conceal, the manner in which these tests were conducted.

In his opening statement to the jury, the prosecuting attorney stated that the Government's case would consist of two parts.

> "The first part of it is explanatory. Before you can follow the testimony about the falsification of the tests you will have to know something about the instrument involved, how it was made and how it was to be tested . . ." (R. 70).

The second part, he explained, would show how the tests were falsified.

In accordance with this plan, the Government, after introducing certain documents in evidence, called as its first major witness Constanz Palliotto, the Government inspector who was responsible for supervising the inspection of radiosondes at the Standard Coil plant and analyzing the test data. His testimony covered the greater part of six days of trial. It dealt in great detail with the way radiosondes were produced, the way they operated, the testing procedures, the duties of the individual defendants and other employees, the respective roles of the Government inspectors and the company employees in the testing process, and other related matters.

Much of this testimony was highly technical, and difficult for a lay jury to follow. In order to assure that the jury would understand it, the judge occasionally reminded the witness that he was talking to untrained people, and that he should speak as if he were talking to an intelligent child (R. 102, 117, 165).

Also, when the judge felt that the witness' testimony was not sufficiently clear, he would attempt to elicit more simple explanations.

The witness' inability to express technical matters in laymen's terms was not the only problem presented by Palliotto's testimony, however. It also became apparent at an early stage that the witness had difficulty articulating even non-technical ideas. For example, he described an operation which made "spurious marks" on a piece of paper, by which he meant—as became clear on close questioning by the judge—marks made on the "spur of the moment" or instantaneously (R. 135-36). On another occasion, he used the term "virgin hair," by which he meant, it turned out, "hair that has not been subjected to dyes or any cosmetics" (R. 143).

While the latter incident was only humorous, the former,

as the judge realized, could be prejudicial in a trial where the offense charged is in the nature of fraud. For that reason the judge followed the witness' testimony closely, and insisted on precision at every step, in an attempt to avoid ambiguity which could be damaging to the defendants.

The trial judge repeatedly found it necessary to explain to the witness "the seriousness of the case in which you are testifying," and the disastrous consequences that might result from careless statements (R. 166, 313-14, 315, 328, 352, 398, 477).

At first, the judge was extremely patient with the witness. By the end of the second day, however, he began to show signs of exasperation. The witness had identified an exhibit as a document prepared by an agent of the company which turned out to be, in part, a Government inspector's worksheet. When this became evident, the judge granted a motion to strike, and ordered that "these misleading exhibits" be taken from the jury (R. 171). He then stated:

> "I am quite prepared to take drastic action in connection with this case. I think the best thing would be to give you a recess for the balance of the day, and on Monday come in at 10:00 o'clock, and if the case at that time, in connection with this technical matter, is not so prepared that I feel the jury is getting a fair picture I am not going to submit anybody to the risks of this kind of confusion in this very grave case in which the charge is that the defendants have confused the Government with false and misleading reports." (R. 172).

The pattern, however, remained the same. For example, the witness on Monday was asked whether he had made any notes of his daily activities for a certain period. He said he had had such notes, but had destroyed them "the last year or so." He was then asked whether he destroyed them after the indictment had been returned in January, 1960. His an-

swer: "No, before that sir." But when asked whether he had destroyed them after learning that there was a charge of wrongdoing against the defendants, he first answered "no," then, when pressed "It could have been, I'm not positive," and later when pressed further, "no" again. (R. 246-248).

On the following day, the trial judge raised this question again, and asked the witness what his testimony had been. The answer: "I don't remember exactly what I answered yesterday." Then he was asked, "what is the truth," and he said: "The answer would be yes; I would have to stick by that" (R. 351-52).

On the next day, however, the witness testified that he had not destroyed any notes relating to the radiosonde, and that he thought the prior questions had been directed to his business notes in general (R. 418-19).

Earlier on the same day, the witness had testified that he had destroyed certain test tapes, on which were recorded the signals produced by the radiosondes under the test conditions. He stated, however, that he had *not* destroyed any tapes after the FBI had begun its investigation, in September 1957. He was then asked whether he had been instrumental in instigating the FBI investigation, to which he answered "yes."

He said that he had given the FBI a written statement sometime in September, 1957, that he could not remember what time of the month, that it had been "within two or three weeks" after Labor Day, that the statement was in the form of a longhand letter, that he had no carbon copy, that he did not know whether he had written it in his office or his home, and that he had subsequently signed a statement prepared for him by the FBI.

The judge suggested to the prosecutor that he make an effort to get the original letter from the FBI. At that point, the witness suddenly changed his testimony, and said "I think at the first instance, I visited the FBI office with an-

other personnel from the Signal Supply Agency." He identified the "other personnel" as a Mr. Young. When asked again about the letter, he said he had not sent such a letter to the FBI at all. He also suddenly remembered, with great specificity, that he had visited the FBI "between the sixth and the ninth of September" and that he *had* destroyed test tapes subsequent to those dates (R. 353-58).

At this point, the judge dismissed the jury from the room, and suggested that the United States Attorney should *nol pros* the case, because of the way in which Palliotto's testimony had been going. He said that, in his view, there was "no chance whatsoever that this jury would convict these defendants if a conviction required any credit of Mr. Palliotto." Further, he said, "if in the end the jury did believe this witness, I think it would be also inevitable that I would have to set aside the verdict . . ." The United States Attorney objected to the suggestion on the ground that Palliotto was not testifying about the fraud, but only providing a foundation for the fraud testimony. But the impression created by Palliotto's testimony, the judge said, was ineradicable. And, as counsel for the corporate defendant pointed out, the Government had stated earlier in the trial that Palliotto was to be recalled to testify concerning the fraud, and it was only for this reason that defense counsel had not cross-examined him on that subject (R. 358-65).

Nevertheless, the United States Attorney elected to continue the trial.

In the middle of the seventh day, Palliotto concluded his testimony. The Government then called a witness by the name of Berne Fisher, who had once been an employee of Standard Coil and who testified briefly as to the organization of the company and the jobs held by the individual defendants and certain other employees (R. 481-500).

The next witness was Robert Rosenholm, who turned out to be the last witness the Government presented. He had been named as a co-conspirator in the indictment, although

he had not been indicted, and he identified himself as a former "final inspector" of radiosondes for Standard Coil.

After giving some general background testimony as to the nature of his former duties at Standard Coil, he began to testify concerning the alleged conspiracy. Like Palliotto, his testimony was, in part, self-contradictory (*Compare* R. 542-46 *with* R. 546-48).

At one point, he was asked about a conversation he had had with one Teichman, whom the witness identified as the company's lawyer. After first stating that he was "not sure" when this conversation took place, he stated that it was in 1958, and that he believed it was in February of that year (R. 552). When the witness was asked to relate the content of his conversation with Teichman, the matter of the attorney-client privilege was raised. At a bench conference, the prosecuting attorney explained that he intended to show that at this meeting Teichman was informed of what was "going on" with respect to the testing of radiosondes, that the company thereafter retained the employees participating in the alleged fraud, and that Teichman affirmatively attempted to conceal the facts. The court ruled that "if you prove that, I will let the conversation in, but I will not allow you to do it by hypothesis" (R. 553-57). A recess was called to permit counsel to prepare a proper foundation for the admission of the testimony (R. 558-59).

When the trial resumed on the following day, Rosenholm was again asked to give his recollection of the date when the conversation with the attorney occurred. At this time he gave the date of the conversation as September 1957 (R. 559).

On cross-examination, Rosenholm, after first saying that he couldn't recall what had taken place that morning before the trial, admitted that he had changed the date as a result of the discussion with the Assistant United States Attorney (R. 567).

The date of the conference was highly significant. The

indictment alleged that the conspiracy took place from September 1956 to November 1957. Thus, the testimony concerning the conversation with the company's attorney would be admissible only if it took place during that period.

The trial judge then excused the jury and the witness, and after expressing his belief that the prosecutor had violated an elementary rule (R. 569), suggested that the situation might be such as to require him to respond to a motion (R. 569-70). The Assistant United States Attorney said that the actual time of the conference was not a point on which the case swung (R. 571). The court pointed out, however, that he had recessed the trial for the very purpose of permitting the Government to lay a proper foundation, if one could be laid, with regard to the admission of the testimony which the Government claimed would show that there was a continuous conspiracy involving the attorneys, the officers of the corporation, and other conspirators, as well as the defendants (R. 571).

Counsel for the company then moved in the alternative for acquittal of the corporate defendant, or action by the court striking the testimony of the witness. Counsel for the individual defendants moved simply for a judgment of acquittal (R. 572).

The trial court recalled the jury, and after absolving the United States Attorney and his Assistants of any intention of acting wrongfully, reviewed the situation as he saw it (R. 572-75). There had already been, he said, witnesses who showed a "lamentable lack of awareness or lack of capacity in connection with their testimonial obligations" (R. 573). He described the present witness as one who had shown "either a lamentable lack of memory or an extraordinary power of inventiveness" in connection with a previous portion of his testimony (R. 575). He then concluded:

> "With due regard for the principles of justice under law, I must bear in mind not only what may be correct, but what is fair. In our constitutional system, under

our jurisprudence, many things which are true are not allowed to be shown. Examples are a confession extorted by physical coercion; such a confession is not admissible although it may be perfectly correct and the defendant may be guilty. Likewise, information procured by an unlawful search and seizure may be perfectly true and the defendant may be guilty; nonetheless it is well settled that no conviction can be based lawfully upon information unconstitutionally procured by an unreasonable search or seizure.

"These principles illustrate the sensitivity of American courts to fair play in connection with every aspect of the criminal law. It is not the duty of a court to see that every guilty man is punished. It is the duty of a court to see that every man gets a fair trial. The highest public interest is not the punishment of the wicked, but the establishment and maintenance of justice under law.

"Bearing in mind these principles, and responding to the motions of acquittal made by counsel for the individual defendants and the corporate defendant, I direct you at this stage to return the verdicts of acquittal with respect to each of the individuals and with respect to the corporation.

* * * *

"The Court. The defendants will stand. (The defendants complied.) You have been acquitted by direction of the Court and by the Court. Your bail is terminated. You are free" (R. 575-76).

On September 21, 1960, the following judgment was entered on the docket:

"The defendants, Standard Coil Products Co., Inc., Fong Foo, and Robert Knupp, having been set to the bar to be tried by a jury for the offenses of concealment of material facts and conspiring to conceal material

facts in a matter within the jurisdiction of an agency of the United States in violation of 18 U.S.C. 1001 and 371 as charged in 9 counts, and

"On September 20, 1960, upon the allowance of motions for acquittal made on behalf of each defendant, it is

"ORDERED that each defendant be, and hereby is, acquitted of the offenses charged, and it is

"FURTHER ORDERED that each defendant be, and hereby is, discharged" (R. 37).

On September 28, 1960, the Government filed, with the District Court, a motion to vacate the judgment of acquittal and for reassignment for trial. In that motion, the Government urged (1) that the court had no authority to acquit and discharge the defendants until the evidence to be presented by the Government was closed, and that the judgment which had been entered was therefore void, (2) that the legal effect of the order, given its maximum possible scope, "amounted to no more than the granting a motion for mistrial," and (3) that the grounds upon which the court relied were insufficient even to justify a mistrial (R. 38-39). The motion was denied.

The Court of Appeals

The Government then filed a petition for a writ of mandamus in the Court of Appeals for the First Circuit (R. 1-6). The petition set forth the grounds which had been urged in the District Court and prayed that the judgment of acquittal be vacated and the case be reassigned for trial. The defendants were permitted to intervene (R. 39-40). The Court, on February 2, 1961, issued its opinion and the writ which the Government had requested. Although not requested to do so, it directed that the case be reassigned by the District Court for trial before another judge.

The majority opinion, per Woodbury, Chief Judge, recited in detail the circumstances of the trial. It concluded

that it was not clear on the record whether the trial judge directed acquittal because he thought the testimony produced by the Government was fatally defective, or because he thought the action of the Assistant United States Attorney deprived the defendants of their rights. In either case, it held, his action was not only erroneous but "beyond his jurisdiction" (R. 50).

As to the first possible ground, the Court was extremely critical of the trial judge. Although acknowledging that the testimony of the two principal witnesses "was certainly confused and conflicting," it concluded that the confusion and conflicts were, at least in part, generated by the questions asked by the trial judge. The witnesses' memories, the Court of Appeals agreed, "were not entirely reliable" and "they were not masters of the English language," but the trial judge was required to accept the witnesses as they were and should not have engaged in sharp, persistent questioning which only succeeded in further confusing them and disrupting the Government's case (R. 51).

As to the second possible ground for the trial court's action, the Court of Appeals saw no conceivable basis for it. The Court conceded, although it specifically did not decide, that a judgment of acquittal "might be warranted in the event that deliberate misconduct of Government counsel is so outrageous as not only to render the trial in progress unfair but also to make a fair trial in the future impossible" (R. 54 n. 5). It concluded, however, that the Assistant United States Attorney was not guilty of any misconduct or impropriety, and even if he had been the most the defendants would be entitled to in this case would be an order of mistrial (R. 54).

Having determined that the trial judge had erred, the court then turned to the question of whether it had power to correct the error. It conceded that, in view of the inability of the Government to appeal, error by the trial court in exercising its powers was not reviewable. The only possible basis

for action was exercise by the trial judge of a power he did not possess. The trial court clearly had power to order an acquittal, under Rule 29(a) of the Federal Rules of Criminal Procedure, after the Government had closed its case. And the Government conceded (although the Court of Appeals did not decide), that such an order might be entered before the close of the Government's case if it were clear that, irrespective of the evidence to be produced later, what had already transpired made a conviction impossible. This was not the situation here, the Court of Appeals concluded, and therefore it did not have to decide whether under any circumstances a trial judge had power to enter a judgment of acquittal prior to the close of the Government's case (R. 54-55).

The Court of Appeals proceeded to conclude, nevertheless, that under the circumstances of the present case the Court had no power to enter a judgment of acquittal and that mandamus was a proper remedy to correct the purported exercise of that power. The court based this conclusion on two cases, *Ex parte United State,* 242 U. S. 27 (1916), and *Ex parte United States,* 287 U. S. 241 (1932). In the first case, which the court conceded was not in point, this Court had held that a district judge had no power to suspend a mandatory sentence, and that mandamus would lie to require the judge to vacate the order of suspension. Primarily relied upon by the Court of Appeals was the observation by this Court, in that case, that if the legislative command fixing a specific punishment could be set aside it would follow that a trial judge could refuse to treat as criminal an act which the legislature had so designated (R. 55-56).

More nearly in point, the Court of Appeals said, was the second case entitled *Ex parte United States.* In that case this Court had issued a writ of mandamus directing a district judge to issue a bench warrant which he had refused to do despite the fact that an indictment had been returned by a properly constituted grand jury. That case, the Court of

Appeals said, established that the writ of mandamus was available in aid of its appellate jurisdiction and established "the necessity for issuing the writ" to confine trial judges within their jurisdictional limits (R. 56). Then, arguing by analogy, the court concluded that if a trial judge does not have the power to prevent the arrest of one properly accused of crime, or to refuse without valid reason to try a criminal charge, it followed that a trial judge had no power "arbitrarily to halt the trial of an accused when the government has only begun to present its evidence of guilt. We see no difference in principle between blocking a criminal trial at the threshold and blocking it when the government has barely had a chance to put its toe in the door" (R. 58).

Having thus decided that it had the power to set aside the judgment of acquittal, the court then addressed itself to the question of double jeopardy. It conceded that it would be pointless to issue the writ of mandamus if the plea of *autrefois acquit* would be available on a second trial. But, it concluded, since the trial judge had no power to enter a judgment of acquittal there would be no basis for a claim of double jeopardy (R. 58). (The difference, for double jeopardy purposes, between a first trial blocked "at the threshold" and one blocked after the Government had put it toe in the door" was not discussed by the court.)

Judge Aldrich, although concurring in the result, differed sharply from the reasoning set forth in the majority opinion. Unlike the majority, Judge Aldrich affirmatively held that a trial court did have authority to enter a judgment of acquittal at any stage at which a fatal deficiency in the Government's evidence appeared. That being so, he concluded, and the decision of the trial judge not being reviewable, it would follow that a judgment of acquittal, no matter how erroneous, on the basis of the trial judge's determination that there was a fatal deficiency in the Government's case could not be vacated by way of mandamus (R. 60-62).

The considerations were different, Judge Aldrich argued, with respect to the claim of misconduct by Government counsel. True, the trial court clearly had the power to determine that the conduct of counsel was improper, and the power so to determine necessarily included the power to determine erroneously.

But Judge Aldrich concluded that "what corrective steps the court should take after its determination of a procedural error is a separate question" (R. 62). Even assuming that the prosecutor had violated a rule of conduct in speaking to the witness, Judge Aldrich held that this misconduct did not justify an acquittal because it was "anything but deliberate," and it was not prejudicial to the defendants. Since the date was "a preliminary matter," its "present effect . . . upon the trial was nil. Its future effect was entirely in the control of the court, who could exclude any further evidence relating to this as yet undisclosed conference" (R. 63). Therefore Judge Aldrich concluded:

> "Under these circumstances I do not think that the court had any more power to order an acquittal than it would have had on the basis of some rule of thumb that more than three Government questions asked in good faith, but regarded by the court as irrelevant, had undoubtedly delayed the trial" (R. 63).

Under Judge Aldrich's view, it was critical to determine whether the trial judge had entered the judgment on the basis of his conclusion concerning the evidence or on his view as to Government counsel's misconduct. Concluding that the record showed that the judge had acted because of his belief, whether erroneous or not, that the Assistant United States Attorney had conducted himself improperly, he concurred in the conclusion of the court that the judgment of acquittal was beyond the trial judge's power, that it should be set aside, and that the defendants should be tried again (R. 64-65).

SUMMARY OF ARGUMENT

I

A. One of the most ancient and fundamental precepts of Anglo-American criminal law is the protection against being "twice put in jeopardy of life or limb." While this doctrine has in many respects changed and grown over the centuries, one basic rule has remained intact: once a defendant has been placed in jeopardy and acquitted, he cannot be tried again for the same offense.

At common law, there were three situations in which a plea of *autrefois acquit* would not bar a second trial: where the indictment at the first trial had been legally insufficient, where the court in which the first trial was held lacked jurisdiction, and where the acquittal was obtained by fraud or collusion. In all three, the reasoning was that the first trial was entirely void, in the sense that, no matter what happened during its course, there could not have been a valid conviction, and the defendant thus had not been in jeopardy. In *United States* v. *Ball,* 163 U. S. 662, 669 (1896), this Court refused to follow the common law rule in a case in which a defendant tried on an insufficient indictment had been acquitted by the jury. In the other two situations the rule is still generally followed, although no such case has ever been decided by this Court.

But we know of no case in which a defendant has been retried after having once been acquitted on a valid indictment, before a court of competent jurisdiction, in proceedings free from fraud or collusion. No matter how erroneous or irregular the acquittal is, the courts have consistently held that it is a bar to another trial.

The Government, and the court below, conceded that an erroneous acquittal would bar a second trial, but took the view that in granting the acquittal in this case the trial judge not only committed error, but exceeded his power.

This contention, even if correct, does not provide a basis for holding that the constitutional protection is not available to the defendants. The test is whether the defendants were in jeopardy of conviction when they were acquitted. The propriety of the acquittal itself is not relevant at all.

The single case relied upon by the court below, *Mitchell* v. *Youell,* 130 F.2d 880 (4th Cir. 1942), is inapposite. There the court, in setting aside a conviction on a writ of *habeas corpus* because the petitioner had been denied his constitutional right to counsel, stated that the petitioner could be tried again. Not only is that case distinguishable because it was a conviction, not an acquittal, which was set aside, but also, as this Court held in *Johnson* v. *Zerbst,* 304 U. S. 458, 468 (1938), the trial court, by depriving the defendant of his right to counsel, lost jurisdiction to proceed, and therefore the defendant was not in jeopardy.

A recent English case involving facts strikingly similar to those here, demonstrates that the sole test of whether an acquittal bars a second trial is whether at the first trial the defendant was in jeopardy of conviction. In *Rex* v. *Middlesex Justices ex parte Director of Public Prosecutions,* [1952] 2 All Eng. Rep. 312 (Q.B. Div), the trial judge had directed a verdict before any evidence had been introduced, on the ground that he had read the "depositions" and believed there was insufficient evidence to support a conviction. The court of Queens Bench refused to issue a writ of certiorari to set aside the acquittal, and rejected arguments similar to those made by the Government here. While the court criticized the trial judge in the strongest terms, it held that the defendants had been in jeopardy, and therefore could not be tried again.

B. The court below reasoned that if the judge lacked power to grant the judgment of acquittal, the judgment must be considered a nullity, and that it therefore could not bar a second trial. If the argument made above is correct,

the acquittal, even if beyond the judge's powers, cannot be considered a nullity for double jeopardy purposes.

But whether or not the acquittal is to be considered effective, the fact is that the judge terminated the trial, and a second trial would undeniably be a second jeopardy.

The attempt of the Government and the court below to treat the judge's order as a declaration of mistrial does not provide an answer, for even if the judge had declared a mistrial in the circumstances of this case, the defendants could not be tried again.

It must be remembered that the trial was going very well from the defendants' point of view. If the judge had declared a mistrial, it would not have been for the protection of the defendants, but for the benefit of the prosecutor. The sole effect of such action would have been to permit the prosecutor to repair the defects in its case at a second trial. This is precisely what the double-jeopardy protection was intended to prevent.

In the early English common law, a trial judge was not permitted to terminate a trial for any reason until a verdict had been rendered. In this country, this rule was abandoned in favor of a more practical and humane approach, under which the trial judge has discretion to declare a mistrial whenever such action is manifestly necessary or where it would serve the interests of justice. *United States* v. *Perez*, 9 Wheat. 579 (1824). It has always been understood, however, that if the trial judge declares a mistrial without sufficient justification or in circumstances in which such action is prejudicial to the defendants, the double jeopardy clause protects the defendants against a second trial.

The recent decision of this Court in *Gori* v. *United States*, 367 U. S. 364 (1961), bears out this analysis. In that case, the majority held that the defendant could be retried, although an earlier trial had ended in a mistrial ordered by the judge *sua sponte*, because the mistrial had been declared for the purpose of protecting the defendant. The dissent-

ing Justices believed that even this was not a sufficient justification, and that a mistrial ordered without the consent of the defendant must, in the absence of manifest necessity, bar a second prosecution. Thus, the Court seemed to be unanimously of the view that if a mistrial is ordered for reasons other than necessity or the protection of the accused, the defendant cannot be tried again.

The argument made by the Government below, that the defendants' motion for a judgment of acquittal was equivalent to consent to a mistrial, is plainly without merit. The fact is that defendants, when invited to make a motion, did not move for a mistrial. Moreover, they would have been foolhardy to do so, since the judge had stated it to be his opinion that no jury could possibly convict on the basis of the Government's testimony, and that if a conviction were returned he would probably set it aside.

Finally, even if it were possible to construct a theory on which it would have been proper for the judge to declare a mistrial in this case, the fact is he did not do so. In *Gori,* this Court held that the trial judge is vested with broad discretion in deciding whether or not to order a mistrial, and that he should make his decision in the light of all the circumstances known to him, including those which are not reflected in the record. Surely, the decision of the trial judge not to order a mistrial in this case is entitled to as much respect as the opposite decision of the trial judge in *Gori,* particularly since the record here shows no basis on which a mistrial could properly have been granted.

II

In order to sustain the action of the court below, it is necessary not only to overcome the constitutional difficulties discussed above, but to find some statutory basis for reviewing and setting aside a judgment of acquittal. The lower federal courts, after all, have only such jurisdiction as is given them by statute.

The court below conceded that there is no statute giving the Government the right to appeal from a judgment of acquittal, but held that it had jurisdiction to review such a judgment under the "all writs" provision of the Judicial Code, 28 U.S.C. § 1651(a).

It is an established principle that the "all writs" provision does not provide a basis for judicial review in situations where there is a clear Congressional hostility to such review. *E.g., Ex parte Pennsylvania Co.,* 137 U. S. 451 (1890). The history of Congressional treatment of review in criminal cases makes very clear that there is a manifest Congressional policy opposed to review of judgments of acquittal.

Until very late in the nineteenth century, neither party could appeal in any criminal cases, and this Court held that there was no jurisdiction in the federal court to issue prerogative writs in a criminal case. *Ex parte Gordon,* 66 U. S. 503 (1862). Since there has been no change in the "all writs" provision, the relevant inquiry here is whether subsequent legislation with respect to criminal appeals can be said to have indirectly had the effect of making the "all writs" provision a basis for jurisdiction to review a judgment of acquittal.

While Congress has subsequently given defendant a right of appeal, and in certain limited instances has given the Government that right as well, it has repeatedly and consistently manifested its hostility to any review of verdicts of acquittal.

The Acts of 1889 (25 Stat. 656) and 1891 (26 Stat. 826) were the first to provide appellate rights to defendants. In response to an argument that they also created jurisdiction to entertain appeals by the Government, this Court stated: "It is impossible to presume an intention on the part of Congress to make so serious and far-reaching an innovation in the criminal jurisprudence of the United States." *United States* v. *Sanges,* 144 U. S. 310, 323 (1892).

Congress first provided for appeals by the Government in 1907 (34 Stat. 1246), but limited the appealable orders to enumerated types rendered prior to trial or after conviction. The legislative history demonstrates that Congress purposely excluded any review of judgments of acquittals, both for constitutional and general policy reasons.

The Government's right to review was not further extended until 1942, and then pursuant to a request by the Attorney General for certain limited additional grounds for appellate review. In making the request, the Attorney General was careful to state that "Such rights should, of course, be limited to cases in which there has not been a verdict in favor of the defendant, for in such an instance the rule against double jeopardy would conclusively bar the government against securing a review." H.R. Rep. No. 45, 77th Cong., 1st Sess. 2 (1941).

No subsequent Congressional action has in any manner modified this long-standing policy against review of judgments of acquittal. Each time Congress amended the criminal appeals statutes, "it did so with careful expression of the limited types of orders in criminal cases as to which the Government might thenceforth have review." *Carroll* v. *United States,* 354 U. S. 394, 402 n. 11 (1957).

While this Court has permitted the issuance of prerogative writs in certain situations, *e.g.,* to compel issuance of a bench warrant, *Ex parte United States,* 287 U. S. 241 (1932), or to prohibit suspension of a mandatory sentence after conviction, *Ex parte United States,* 242 U. S. 27 (1916), these cases all involved matters arising before trial or after conviction with respect to which there is no Congressional hostility to review. The error of the court of appeals in the present case was in applying such cases to a matter with respect to which there is manifest Congressional hostility to review: the judgment of acquittal.

III

If the arguments we have made above are correct, the court of appeals need never have reached the question of whether the trial judge had exceeded his power, and this court need not reach it. On the other hand, if, as we believe, the trial judge did not exceed his power, this in itself is a sufficient ground for reversing the decision below.

Since the power of a federal judge must be determined with reference to the federal statutes, the constitution, and the traditions of the common law, we believe that the arguments we have already made demonstrate that the power of a trial judge to acquit defendants who are properly before him is absolute.

This view, moreover, is supported by the few cases that have had occasion to deal with the question. Particularly significant is the decision of this Court in *United States* v. *Weissman,* 266 U. S. 377 (1924), which held that a judgment of acquittal based on a holding that the indictment was insufficient was effective as an acquittal, even though no evidence had been introduced, and even though the proper action would have been to quash the indictment. The language of the opinion clearly implies that the sole test of the judge's "power" is whether he had jurisdiction over the subject matter and the parties.

The danger that such broadly defined power might be abused is, we suggest, much less than the danger that any limitation on that power might render the court unable fully to protect the rights of the accused. After all, there are no limits on the "power" of a prosecutor to enter a *nol prosequi* in the interests of justice, the effect of which is precisely the same as an acquittal. Why should judges not be trusted with a similar power, since it is they, not the prosecutors, who are the ultimate guardians of our liberties?

But even if it is assumed that there are some limits on a

judge's power to acquit, it is clear that the court below, while it paid lip service to the distinction between "error" and "lack of power," set aside the judgment simply because it believed the judge had committed error. It did not hold that a judge could never grant an acquittal prior to the close of the prosecution's case, either because of the defectiveness of the evidence or because of misconduct by the prosecutor, but only that it was improper to do so in the circumstances of this case. We believe that in order to find that the judge exceeded his power, it is necessary to find not only that his action was improper on *this* record, but that it would have been improper on *any* record.

Thus, the critical questions which must be asked, if it is assumed that the judge's power to acquit is not unlimited, are precisely the ones the court avoided: may a judge acquit before the prosecutor has rested when he believes, however erroneously, that the evidence is fatally defective, and may he do so when he finds, however erroneously, that there has been misconduct by the prosecutor which in his judgment requires such action?

The answer to these questions, we submit, can only be yes. Surely a judge need not permit a trial to continue when the prosecution concedes a critical fact, See, *e.g., McGuire* v. *United States,* 152 F. 2d 577, 580 (8th Cir. 1945), or when he believes that the prosecutor by his own conduct has made a fair trial impossible. See *Jencks* v. *United States,* 353 U. S. 657 (1957). The fact that the court of appeals did not believe that the evidence in this case was fatally defective, or that the prosecutor's conduct was such as to require an acquittal, does not negate the trial judge's power to hold otherwise. The motions for a judgment of acquittal raised these issues and the judge decided them. While he may have decided them erroneously, he certainly cannot be said to have exceeded his power.

ARGUMENT

INTRODUCTION

In this case, for the first time in the history of federal jurisprudence, a court has set aside a judgment of acquittal in a criminal case and ordered that the defendants be retried. The court took this unprecedented action because, in its view, the trial judge exceeded his power in rendering the judgment, and that the judgment, therefore, had to be considered null and void.

We believe (1) that the court erred in concluding that the trial judge exceeded his power, (2) that the court lacked jurisdiction even to review the judgment, and (3) that the defendants' constitutional right not to be put "twice in jeopardy" precludes a second trial in any event. Each of these arguments individually, if sustained, would require reversal of the decision below.

Ordinarily, where there are both constitutional and non-constitutional grounds for reversal, it is sound practice for a court to examine the non-constitutional questions first, and to avoid the constitutional issues entirely if that is possible. It is therefore customary for counsel to present the arguments in that order. In this case, however, we believe an understanding of the historic protection against double jeopardy is essential to an understanding of the non-constitutional as well as the constitutional issues. Therefore, although we do not contend that it is necessary for the Court to decide this case on constitutional grounds, we must begin with a discussion of double jeopardy.

I—TO TRY THE DEFENDANTS IN THIS CASE AGAIN WOULD BE TO PUT THEM "TWICE IN JEOPARDY" IN VIOLATION OF THE FIFTH AMENDMENT

A. *A Defendant Who Has Once Been Placed in Jeopardy and Who Has Been Acquitted Cannot be Tried Again, Irrespective of How Improper the Acquittal Might Have Been.*

One of the most ancient and fundamental precepts in

Anglo-American criminal law is that which is embodied in the "double jeopardy" clause of the Fifth Amendment: "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . ." Like other common law doctrines, this one has developed and grown over the centuries, and its meaning today is not in all respects identical to its meaning in the time of Lord Coke, or even at the time the Constitution was adopted. One rule, however, has remained unchanged through the ages: Once a defendant has been acquitted, he cannot be tried again for the same offense.

> "The practice of the Courts has been settled for centuries, and is that in all cases of a criminal kind where a prisoner or defendant is in danger of imprisonment no new trial will be granted if the prisoner or defendant, having stood in that danger, has been acquitted." *Regina* v. *Duncan,* 7 Q.B.D. 198 (1881)

Precisely when this became established as a firm principle is not clear, see Kirk, *"Jeopardy" During the Period of the Yearbooks,* 82 U. Pa. L. Rev. 602 (1934), but there can be no doubt that it was a basic part of the English common law at the time of the American Revolution:

> "And first of the plea of Autrefois acquit, which is grounded on this maxim, That a man shall not be brought into danger of his life for one and the same offence, more than once. From whence it is generally taken, by all the books, as an undoubted consequence, that where a man is once found *not guilty* on an indictment or appeal free from error, and well commenced before any court which hath jurisdiction of the cause, he may by the common law in all cases whatsoever plead such acquittal in bar of any subsequent indictment or appeal for the same crime." 2 Hawkins, Pleas of the Crown 524 (6th ed. 1787).
>
> ". . . the plea of *auterfoits acquit,* or a former acquittal,

> is grounded on this universal maxim of the common law of England, that no man is to be brought into jeopardy of his life, more than once, for the same offence. And hence it is allowed as a consequence, that when a man is once fairly found not guilty upon any indictment, or other prosecution, before any court having competent jurisdiction of the offence, he may plead such acquittal in bar of any subsequent accusation for the same crime." 4 Blackstone, Commentaries *335.

This principle, "so deeply rooted in the law of England, as an indispensable requirement of a civilized criminal procedure, was inevitably part of the legal tradition of the English Colonists in America." *Green* v. *United States,* 355 U. S. 184, 200 (1957) (dissenting opinion of Mr. Justice Frankfurter). It thus found its way into our Bill of Rights, and from that time until the decision of the Court of Appeals in the present case, there had been no case in the federal courts in which an acquittal had been set aside.

At common law there appear to have been three situations in which a plea of *autrefois acquit* would not bar another trial for the same offense: where the indictment at the original trial was insufficient to sustain a conviction, *Vaux's Case,* 4 Co. Rep. 44 (1591), where the court in which the first trial was held lacked jurisdiction, See Blackstone, *loc. cit. supra;* Hawkins, *loc. cit. supra,* or where the original acquittal was obtained by fraud or collusion, see *Rex* v. *Furser,* Say. 89, 96 Eng. Rep. 813 (1753); 1 Bishop, Criminal Law §1028 (9th ed. 1923).

In all three situations, however, a second trial was allowed not because of the impropriety of the acquittal, but because the first trial was considered "void" in the sense that, no matter what happened during its course, there could not have been a valid conviction, and the defendant was therefore deemed never to have been in jeopardy. In *Vaux's Case,* this conclusion was based on the fiction that if the indictment was defective the trial court would inevitably

have set aside any conviction, and therefore even where a judgment of acquittal is entered by the court after a jury verdict of not guilty, the judgment must be presumed to have been based on the insufficiency of the indictment rather than the verdict. See 2 Hale, Pleas of the Crown 247 (1847). This Court, in *United States* v. *Ball*, 163 U. S. 662, 669 (1896), expressly rejected this fiction, and held that "a general verdict of acquittal upon the issue of not guilty to an indictment undertaking to charge murder, and not objected to before the verdict as insufficient in that respect, is a bar to a second indictment for the same killing."

Although this Court has not had occasion to pass upon the effect of an acquittal procured by fraud, or rendered by a court lacking in jurisdiction, the state courts have largely followed the common law in these situations. See cases collected in Wharton, Criminal Law and Procedure § 139 at 311 n. 11, § 136 at 303 n.19 (12th ed. 1957).

We have not found a single case, however, in England, in the states which provide protection against double jeopardy, or in the federal courts, in which a defendant has been retried after once having been in jeopardy and acquitted on a valid indictment before a court of competent jurisdiction in proceedings free from collusion or fraud. Regardless how irregular or erroneous the acquittal may have been, the courts have uniformly held that the defendant cannot again be put in jeopardy.

> "After jeopardy has attached to the party, the government can take no step backward. If, through a misdirection of the court on a question of law, or a mistake of the jury, or their refusal to obey instructions or any like cause, a verdict of acquittal is improperly rendered, it can never afterward, on the application of the prosecutor, in any form of proceeding, be set aside and a new trial granted." [Citing numerous cases] 1 Bishop, Criminal Law § 992 (9th ed. 1923).

As recently as *Green* v. *United States,* 355 U. S. 184, 188 (1957), this Court reaffirmed the doctrine that an acquittal, however erroneous, is final.

> ". . . it has long been settled under the Fifth Amendment that a verdict of acquittal is final, ending a defendant's jeopardy, and even when 'not followed by any judgment is a bar to a subsequent prosecution for the same offense.' *United States* v. *Ball,* 163 U. S. 662, 671. Thus it is one of the elemental principles of our criminal law that the Government cannot secure a new trial by means of an appeal even though an acquittal may appear to be erroneous. *United States* v. *Ball, supra; Peters* v. *Hobby,* 349 U. S. 331, 344-345. Cf. *Kepner* v. *United States,* 195 U. S. 100; *United States* v. *Sanges,* 144 U. S. 310."

The Government, of course, does not argue here, and the court below did not hold, that an acquittal can be ignored or set aside whenever there has been some impropriety or error in the trial.

Rather, the Government contended, and the court of appeals held, that the judgment of acquittal in this case was not merely erroneous but was beyond the "power" or "jurisdiction" of the court, and that in such circumstances it can be set aside and the defendants retried.

We will discuss in a subsequent portion of this brief the question of whether the trial court was without "power" to enter the judgment of acquittal in the circumstances of this case. Even assuming that the Government and the court below are correct on the "power" issue, however, it would violate the Fifth Amendment protection against double jeopardy to try the defendants again.

Despite the court's use of the term, "jurisdiction," there can be no dispute that the trial court had "jurisdiction" to try this case. As Judge Aldrich pointed out in his concurring opinion below:

> "The court apparently uses 'power' and 'jurisdiction' interchangeably. Certainly there is no question here about the district court's jurisdiction over the case and over the defendants. Accordingly, I will hereafter use the term 'power.' " (R. 59, n. 1)

There is thus no basis for arguing here that the entire trial was void and could not have led to a valid conviction. And, as we have seen, it is only in such circumstances that an "acquittal" has ever been held not to bar a second trial.

In short, the defendants in the present case clearly were in jeopardy. They were on trial before a court and jury having jurisdiction. They could have been convicted. In fact, they were acquitted. In those circumstances, the Fifth Amendment protects them from being retried regardless of the propriety of the judgment of acquittal.

The only case relied upon by the court below in holding that a second trial of the present defendants would not constitute double jeopardy was *Mitchell* v. *Youell*, 130 F.2d 880 (4th Cir. 1942). That case involved a petition for ***habeas corpus*** brought by a prisoner who claimed that his conviction was "void" because he was "tried without benefit of counsel amid circumstances which made the aid of counsel essential to that fair and impartial trial which due process contemplates." The court agreed and granted the writ, but pointed out that the defendant would be subject to a second trial.

> "While the conviction and sentence under the bill must be held to be void and the prisoner released from further service of the sentence, he will be subject to arrest and trial under the indictment. The defense of prior jeopardy will not protect him, for in holding that the trial was a nullity, we hold that he has not been in jeopardy under the charge. It is settled that an accused is not put in jeopardy by a void judgment of conviction, and that upon his discharge thereunder he may be again arrested and prosecuted." 130 F.2d at 882.

That case, of course, does not support the Government's argument here, not only because it involved the setting aside of a conviction rather than an acquittal (and thus presents no more of a double jeopardy problem than does the retrial of a defendant after a conviction is reversed on appeal), but also because, as the court held, the defendant in that case was never in jeopardy. See also *Johnson* v. *Zerbst,* 304 U. S. 458, 468 (1938), in which this Court held that if a defendant is denied the assistance of counsel in violation of the Sixth Amendment "the court no longer has jurisdiction to proceed. The judgment of conviction pronounced by a court without jurisdiction is void, and one imprisoned thereunder may obtain release by *habeas corpus.*"

Thus, neither the *habeas corpus* cases nor the cases which have permitted a second trial after an acquittal procured by fraud or rendered by a court without jurisdiction provide any basis for holding that it would not be double jeopardy to subject the defendants in this case, who have once been in jeopardy and who have been acquitted, to a new trial.

A recent English case, involving circumstances strikingly similar to those involved here, demonstrates that the critical question is not whether the trial court exceeded its power in acquitting the defendant, but whether the defendant was in jeopardy of conviction. In *Rex* v. *Middlesex Justices ex parte Director of Public Prosecutions,* [1952] 2 All Eng. Rep. 312 (Q.B. Div.), the trial judge had directed an acquittal before any evidence at all had been introduced. He had simply announced, at the very outset of the trial, that he had read the depositions in the case and that he believed there was not sufficient evidence to convict the defendant. When the prosecutor nevertheless began to present his case, the judge inquired of the jury whether it wanted to hear any evidence, and the foreman answered, "Under your direction, I should say no, my Lord." Thereupon, a verdict of "Not Guilty by direction" was entered and the defendant was released.

The prosecution sought a writ of certiorari to quash the verdict of acquittal, contending that "in this case there has been no trial at all, and therefore . . . the order of discharge should be quashed and this court should order that the case should be heard according to law." The court, however, while it chastised the trial judge in the strongest possible terms, and stated that his conduct "from first to last . . . can only be described as both unjudicial and injudicious," held that since the defendant had once been in jeopardy he could not be tried again.

> "Here the defendant was properly arraigned and the jury sworn to try him, so technically he was in peril, and as they returned a verdict of Not Guilty, however improperly that verdict may have been obtained, this court cannot, as it seems to us, direct a new trial." [1952] 2 All Eng. Rep. at 314.[1]

The earlier case of *Rex* v. *Simpson,* [1914] 1 K.B. 66, is also relevant. That case involved a prosecution for an offense under the Coal Mines Act of 1911. The trial court, after hearing evidence, dismissed the information. The prosecutor sought to have the judgment set aside, alleging that he had subsequently discovered that two of the justices

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[1] Admittedly, there are some differences between the British and American rules of double jeopardy. For example, in England a defendant cannot ordinarily be tried again even after his conviction has been reversed. See *Green* v. *United States,* 355 U. S. 184, 203 (1957) (dissenting opinion of Mr. Justice Frankfurter). However, the court in the *Middlesex Justices* case does not rely on any concepts which are foreign to the American law. Indeed, the court specifically rejected the argument that any analogy could be drawn between the power of the court to quash a conviction and the power to order a new trial after an acquittal:

> ". . . the books are full of cases where this court has interfered and quashed convictions where there has been a denial of what is for convenience called natural Justice.
>
> There is, however, no case to be found on the books in which the court has ever ordered a retrial after a verdict of not guilty."

who had sat on the trial court were, because of their connections with the coal industry, disqualified under the statute from sitting on cases of this sort without the consent of the parties. The court of Kings Bench held that the statutory disqualification did not render the justices in question wholly without jurisdiction, since they could have sat with the consent of the parties, and therefore the defendants had been in jeopardy and could not be retried.

A similar result was reached in two Irish cases, in each of which the prosecutor sought certiorari to set aside an acquittal on the ground that the trial judge had been biased, *Regina* v. *Justices of Antrim,* [1895] 2 I.R. 603 (Q.B. Div.); *Rex.* v. *Justices of Galway,* [1906] 2 I.R. 499 (K.B. Div.). In the former, Chief Judge O'Brien expressed the governing principle, as an Irishman might, in almost lyrical terms:

> "An acquittal by a tribunal of whatever degree is a judgment *in rem,* a judgment of personal *status.* The law takes off the hand of restraint from the accused, delivers him back into the condition of natural liberty, and seeks not to lure the bird from the air that has once left the cage. This principle is the very essence of the law of England as to personal condition, and tolerates absolutely no inconsistency with it." [1895] 2 I.R. at 641.

These cases demonstrate, we believe, that such questions as whether an acquittal was or was not erroneous, or whether it was or was not within the power of the trial court, are simply not relevant to the issue of double jeopardy. If the defendants have been acquitted after having once been in jeopardy of conviction, as they were here, they cannot be tried again.

B. Even if the Judgment of Acquittal Could Be Considered a Nullity, or Treated as an Order of Mistrial, the Defendants Could Not Constitutionally Be Tried Again.

The court below reasoned that if the trial judge exceeded

his power in granting the judgment of acquittal, that judgment would have to be considered "a nullity," and that in those circumstances the defendants could be tried again. As we have seen, however, the effectiveness of a judgment of acquittal must be determined not on the basis of whether the trial judge exceeded his power in granting it, but on the basis of whether the defendants were in jeopardy of conviction at the time it was granted. Applying that test to this case, the conclusion is unavoidable that the defendants have been effectively acquitted, and cannot be tried again.

But even if the court were correct in holding that the judgment of acquittal must be considered "a nullity," the constitution would prohibit a second trial. The Fifth Amendment, after all, protects defendants from being put "twice in jeopardy." Since it is impossible to impanel the same jury and resume the same trial, a second trial undeniably would be a second jeopardy. And it would result in precisely the evil that the Fifth Amendment was intended to prevent—giving the prosecution a second chance to obtain a conviction by bringing in new evidence or more persuasive, better prepared witnesses.

The Government, in its brief to the court below, attempted to avoid that dilemma by arguing that "the judge's order, being beyond his powers as a judgment, amounted in law only to the declaration of a mistrial." (Gov't Br. below p. 23). The court of appeals seems to have adopted this theory, for it stated that "the most the defendants would be entitled to would be an order of mistrial." (R. 54).

The difficulty with this argument is that whether or not the trial judge acted improperly in entering a judgment of acquittal, it would plainly have been improper and prejudicial to the defendants to order a mistrial in the circumstances of this case, and that fact in itself would preclude a second trial.

It must be remembered that the judge did not take action when he did because of any feeling that the jury had been

unfairly prejudiced against the defendants. On the contrary, the judge had stated: "I do not believe that there is a chance that this jury will convict these defendants. . . ." (R. 364).

The only event which could have been considered prejudicial to the defendants was the conduct of the prosecutor in talking privately to a witness after he had taken the stand, as a result of which the witness changed his testimony. The Government and the court below both took the view that this conduct was not improper. But if it were improper, the harm would be compounded, not remedied, by a mistrial. If the trial continued, the jury at least would know that the witness had changed his testimony, and the circumstances in which he had changed it. At a new trial, however, the prosecutor would be able to prepare the witness more carefully, and thereby avoid any contradiction in testimony taking place. And even if the contradiction at the earlier trial would be brought out on cross-examination, the effect could hardly be as dramatic as it was at the first trial.

Everything else that happened at the trial—the inarticulate and confused testimony of the Government witnesses, the judge's occasional impatience with and disapproval of that testimony, the judge's criticism of the prosecutor—clearly had benefited the defendants. A new trial would simply have given the Government a chance to improve its case. It was precisely for this reason that, when called upon by the judge to make a motion, the defendants did *not* move for a mistrial. The corporate defendant moved to strike the testimony of the witness or alternatively for an acquittal; the individual defendants moved only for an acquittal. If the judge had then declared a mistrial, it would plainly have been not for the purpose of protecting the rights of the accused, but for the benefit of the prosecutor.

It is well established that if a criminal trial is terminated in such circumstances, the defendant cannot be tried again.

". . . it is not even essential that a verdict of guilt or

> innocence be returned for a defendant to have once been placed in jeopardy so as to bar a second trial on the same charge. This Court, as well as most others, has taken the position that a defendant is placed in jeopardy once he is put to trial before a jury so that if the jury is discharged without his consent he cannot be tried again. *Wade* v. *Hunter,* 336 U. S. 684; *Kepner* v. *United States,* 195 U. S. 100, 128. In general see American Law Institute, Administration of the Criminal Law; Double Jeopardy 61-72 (1935). This prevents a prosecutor or judge from subjecting a defendant to a second prosecution by discontinuing the trial when it appears that the jury might not convict. At the same time, jeopardy is not regarded as having come to an end so as to bar a second trial in those cases where 'unforeseeable circumstances . . . arise during [the first] trial making its completion impossible, such as the failure of a jury to agree on a verdict.' *Wade* v. *Hunter,* 336 U. S. 684, 688-689." *Green* v. *United States,* 355 U. S. 184, 188 (1957).

In the early English common law, courts were not permitted to discharge the jury until a verdict had been rendered.

> "To speak it here once for all, if any person be indicted of treason, or of felony, or larceny, and plead not guilty, and thereupon a jury is returned, and sworn, their verdict must be heard, and they cannot be discharged . . ." 3 Coke, Institutes 110.

Although this may originally have been a rule of practice the violation of which did not preclude a second trial, see Kirk, *"Jeopardy" During the Period of the Yearbooks,* 82 U. Pa. L. Rev. 602, 603 (1934), 2 Hale, Pleas of the Crown 295 (1847), it ultimately became part of the doctrine of double jeopardy. See *Green* v. *United States,* 355 U. S. 184, 203 (1947) (dissenting opinion of Mr. Justice

Frankfurter). Thus, at common law, once the defendant had been put to trial, the trial had to be concluded, and once he had been convicted or acquitted, he could not be tried again.[2]

The American law developed somewhat differently. This Court held in *United States* v. *Perez,* 9 Wheat. 579 (1824), that a trial judge has authority to discharge a jury and order a new trial where the jury has failed to reach a verdict or where for any other reason such action is necessary or proper in the interest of justice.

> "We think, that in all cases of this nature, the law has invested courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject; and it is impossible to define all the circumstances which would render it proper to interfere. To be sure, the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes; and in capital cases especially, courts should be extremely careful how they interfere with any of the chances of life, in favor of the prisoner. . . . We are aware that there is some diversity of opinion and practice on this subject, in the American courts; but, after weighing the question with due deliberation, we are of opinion that such a discharge constitutes no bar to further proceedings, and gives no right of exemption to the prisoner from being again put upon trial." *Id.* at 580.

The common law rule that a jury could not be discharged for any reason was thus replaced in American jurisprudence

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[2] Not until the 1860's did the English courts hold that a jury could be discharged when it failed to reach agreement on a verdict. *Regina* v. *Charlesworth,* 5 L.T. 150 (Q.B. 1861); *Regina* v. *Winsor,* 10 Cox C.C. 276 (Q.B. 1865, Ex. Ch. 1866).

with the more practical and humane principle that a trial court has discretion to discharge the jury and order a new trial where such action is manifestly necessary or where it would serve the interests of justice.

It has always been understood, however, that if the trial judge declares a mistrial without sufficient justification or in circumstances in which such action is prejudicial to the defendant, the double jeopardy clause of the Fifth Amendment would bar a second trial. See, *e.g.*, *Wade* v. *Hunter*, 336 U. S. 684 (1949); *Simmons* v. *United States*, 142 U. S. 148 (1891); *Thompson* v. *United States*, 155 U. S. 271 (1894); *Logan* v. *United States*, 144 U. S. 263 (1892). In each of these cases, the question presented was whether the defendant could be retried after the first trial had been terminated by the trial judge prior to its conclusion, and in each case this Court held that the second trial was permissible because the action of the trial judge in terminating the first trial was proper. The clear implication of this line of cases is that if the judge *improperly* terminates a criminal trial after the defendant is in jeopardy the Fifth Amendment would preclude a second trial. And it is certainly improper to declare a mistrial where there is no necessity for it, and where the effect is prejudicial rather than helpful to the defendant. See *Cornero* v. *United States*, 48 F. 2d 69 (9th Cir. 1931); *United States* v. *Whitlow*, 110 F. Supp. 871 (D.D.C. 1953); *United States* v. *Shoemaker*, 2 McLean 114 (7th Cir. 1840); *United States* v. *Watson*, 28 Fed. Cas, 499 (S.D.N.Y. 1868).

The decision of this Court just last term in *Gori* v. *United States*, 367 U. S. 364 (1961), bears out this analysis. The petitioner in that case had been tried a second time and convicted, after the judge at the first trial had *sua sponte* declared a mistrial because of what he believed to have been improper conduct by the prosecuting attorney. Petitioner argued that his second trial constituted double jeopardy because the first trial had been terminated without manifest

necessity and without his consent. This Court, in a 5-4 decision, affirmed the conviction. The majority relied on the finding of the court of appeals that the trial judge, in declaring a mistrial, "was acting according to his convictions in protecting the rights of the accused," and that his action, while possibly "overassiduous," was not an abuse of discretion. In those circumstances, the Court held, the defendant could be retried even though he had not consented to the mistrial. The minority took a more narrow view of the judge's discretion to grant a mistrial, and held that "absent a showing of imperious necessity" a criminal trial may be terminated only with the defendant's consent.

The significant aspect of the case for present purposes, however, is that the court appeared to be unanimous in the view that if a mistrial is declared for reasons other than necessity or the protection of the defendant, a second trial would be prohibited by the Fifth Amendment. Since in this case, unlike *Gori,* there can be no question that a declaration of mistrial would have been prejudicial to the defendants, it follows that they cannot be tried again.

In an apparent effort to circumvent this difficulty, the Government argued in the court below that the defendants, "having solicited the interruption of the first trial by unlawful entry of a 'judgment of acquittal,' . . . cannot complain of a second trial." (Gov't Br. below p. 36).

In support of this contention, the Government relied on the cases which hold that a defendant can be retried if his conviction is reversed on his own appeal, *e.g., United States* v. *Ball,* 163 U. S. 662 (1896), if his conviction is set aside on a petition for *habeas corpus, e.g., Mitchell* v. *Youell,* 130 F. 2d 880 (4th Cir. 1942), or if a mistrial is granted on defendant's motion, *e.g., United States* v. *Harriman,* 130 F. Supp. 198 (S.D.N.Y.), *aff'd,* 219 F. 2d 918 (2d Cir. 1955).

Those cases, of course, are entirely inapposite here, for they all involved situations where the defendant *asks* for a new trial. In the present case, the defendants asked to be

acquitted. They did not ask for, and they plainly would not have consented to, a new trial. On the contrary, if the judge had denied the motions for acquittal, the defendants would undoubtedly have elected to continue the trial. Not only had the testimony of important Government witnesses been weak and contradictory, but the trial judge had unequivocally expressed his view that the jury could not possibly bring in a verdict of guilty (R. 364), and had plainly indicated that he would set aside such a verdict if it was returned (R. 362). Thus it would have been sheer foolhardiness for the defendants to ask for or consent to a new trial, and there is no basis whatever for inferring that they even contemplated doing so.

Even if it were possible to construct a theory on which it would have been proper for the trial judge to declare a mistrial in this case, the fact is he did not do so, and there is every reason to believe that he would not have done so. This Court, in *Gori,* held that the trial judge is vested with broad discretion "in determining whether or not a mistrial is appropriate," 367 U. S. at 366, and that that discretion is to be exercised in the light of all the circumstances of the trial, including those which only the trial judge can evaluate and which would not be reflected in the cold record. Surely, therefore, the judge's decision here not to declare a mistrial is as worthy of respect as the judge's opposite decision was in *Gori,* particularly since the record here shows no basis on which a mistrial might have been granted.

In short, none of the arguments advanced either by the Government or the court below provide any constitutional justification for trying the defendants again. If the judge exceeded his power in granting the judgment of acquittal, the judgment nevertheless cannot be considered void, for the fact remains that the defendants were in jeopardy and were acquitted. That fact in itself is sufficient to preclude a second trial. If the judgment could be considered void, the fact remains that the trial has been terminated, and that fact

in itself is sufficient to preclude a second trial. And if the action of the trial judge could be "deemed" to be a declaration of mistrial (although the judge certainly did not intend it to be that), the fact remains that a mistrial in the circumstances of this case would have been improper and prejudicial to the defendants, and that fact in itself is sufficient to preclude a second trial.

It may be, as the court below held, that the trial judge in this case committed error, perhaps even egregious error. It may even be that he exceeded his power. But error by the trial judge, of whatever magnitude and however it may be characterized, simply does not operate to take from the defendants their constitutional right not to be put twice in jeopardy for the same offense.

II—CONGRESS HAS PROVIDED NO JURISDICTION TO REVIEW JUDGMENTS OF ACQUITTAL, EITHER ON APPEAL OR BY WRIT OF MANDAMUS.

The Government has never had the right to appeal from a judgment of acquittal in any criminal case in the federal courts. This results not only from the Constitutional impediments which we have discussed above, see *Kepner* v. *United States,* 195 U. S. 100 (1904), but also from the fact that Congress has not given the courts of appeals any jurisdiction to entertain appeals from such judgments.

It must be remembered that the lower federal courts have only such jurisdiction as is given them by statute. U. S. Const., Art. III, §1; *Ex parte McCardle,* 74 U. S. (7 Wall.) 506 (1869); *Carroll* v. *United States,* 354 U. S. 394, 399, (1957). In order to sustain the action of the court below, therefore, it is necessary not only to overcome the Constitutional difficulties but also to find some statutory basis for reviewing and setting aside a judgment of acquittal.

In this case, the Government, conceding that it could not appeal, sought and obtained review of a judgment of ac-

quittal on a petition for mandamus, relying on 28 U. S. C. §1651(a) (hereinafter referred to as the "all writs" provision) as the basis of jurisdiction. In our view, however, the clear statutory policy against review of judgments of acquittal on appeal precludes the inference that the "all writs" provision creates jurisdiction to review such judgments on a petition for mandamus.

It is an established principle that the general power of a court to issue prerogative writs may not be used as a means to skirt a specific Congressional policy against review. The principle has most often been enunciated by this Court with respect to a problem in the civil field: the power to review a district court's remand of a case to the state court from which it has been removed.

In *Ex parte Pennsylvania Co.*, 137 U. S. 451 (1890), this Court ruled that when Congress, in a statute abrogating appeals, had indicated its hostility toward review of remand decisions, the jurisdiction of appellate courts to issue writs of mandamus was also denied. This ruling was reached although there was no provision expressly prohibiting review by mandamus.

> "The first question to be decided is, whether this court has power to grant the writ applied for. The general power of the court to issue a writ of mandamus to an inferior court, to take jurisdiction of a cause when it refuses to do so, is settled by a long train of decisions . . .
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> ". . . and if the decision of the present case depended only on the general rule, the power of the court to issue the mandamus would be undoubted.
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> "But in our opinion, the matter is governed by statute. . . . The provision of the Act of 1887 is as follows: 'Whenever any cause shall be removed from any state court into any circuit court of the United States, and the circuit court shall decide that the cause was improperly removed, and order the same to be remanded

to the state court from whence it came, *such remand shall be immediately carried into execution,* and no appeal or writ of error from the decision of the circuit court so remanding such cause shall be allowed' . . . In terms, it only abolishes appeals and writs of error, it is true, and does not mention writs of mandamus; and it is unquestionably a general rule that the abrogation of one remedy does not affect another. But in this case, we think it was the intention of Congress to make the judgment of the circuit court remanding a case to the state court final and conclusive. . . . The abrogation of the writ of error and appeal would have had little effect in putting an end to the question of removal, if the writ of mandamus could still have been sued out in this court. It is true that the general supervisory power of this court over inferior jurisdictions is of great moment in a public point of view, and should not, upon light grounds, be deemed to be taken away in any case. Still, although the writ of mandamus is not mentioned in the section, yet the use of the words 'such remand shall be immediately carried into execution,' in addition to the prohibition of appeal and writ of error, is strongly indicative of an intent to suppress further prolongation of the controversy by whatever process. We are therefore of opinion that the Act has the effect of taking away the remedy by mandamus as well as that of appeal and writ of error." (pp. 452-54).[2a]

[2a] This decision has been followed in numerous cases, including *Ex parte Matthew Addy Steamship & Commerce Corp.*, 256 U. S. 417 (1921) and cases cited therein; *Employers Reinsurance Corp.* v. *Bryant*, 299 U. S. 374 (1937); *Kloeb* v. *Armour & Co.*, 311 U. S. 199 (1940); and *United States* v. *Rice*, 327 U. S. 742 (1946).

Another area in which this consideration has been applied is that of finality of ICC orders. "The policy of the law has been to give finality to orders of the Commission . . . and to keep them out of the courts . . . A dissatisfied complainant is not permitted to escape these

As we shall see, the history of Congressional regulation of review of criminal cases manifests a hostility toward review of judgments of acquittal even more deep-rooted and fundamental than that which is the basis for the remand decisions. It follows that, just as in the remand cases, the "all writs" provision should not be so construed as to undermine this policy.

At the time the "all writs" provision was originally enacted, as a part of the Judiciary Act of 1789, there was no appellate review of criminal cases whatever, at the behest of either the defendants or the Government.[3] This Court therefore held, in 1862, that the "all writs" provision did not apply to criminal cases at all, even when a prerogative writ was sought by a defendant. *Ex parte Gordon*, 66 U. S. 503 (1862).

If review of a judgment of acquittal by prerogative writ is available now, it must be that some action of Congress, subsequent to the *Gordon* decision, can be said to have made it so. There have been no relevant amendments to the "all writs" provision as such, of course. But that statute is by its nature a flexible jurisdictional grant, designed to aid the appellate jurisdiction of the courts. As Congress expands or contracts *appellate* jurisdiction, the scope of the "all writs" provision is sometimes affected.

Since the *Gordon* decision, Congress has provided a general appellate jurisdiction over criminal cases at the behest of the defendant, and a limited appellate jurisdiction at the behest of the Government. But in the course of so doing, Congress has manifested an opposition to review of verdicts favorable to the defendant. Therefore to conclude that anything has occurred which would make verdicts of acquit-

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limitations indirectly by broadening the functions of mandamus when he is barred from more direct review." *Interstate Commerce Commission* v. *United States*, 289 U. S. 385, 394 (1933).

[3] See *Carroll* v. *United States*, 354 U. S. 394, 400 n. 9 (1957).

tal reviewable by prerogative writ would be wholly unrealistic, and would thwart the intention of Congress.

The first Act of Congress authorizing any appeal in a criminal case was the Act of February 6, 1889, Chap. 113, 25 Stat. 656, which provided that "in all cases of conviction" of a capital crime in any court of the United States, the final judgment "against the respondent" might, on his application, be re-examined, reversed or affirmed by the Supreme Court on writ of error. "The writ of error given by that Act was thus clearly limited to the defendant." *United States* v. *Sanges,* 144 U. S. 310, 322 (1892).

The Judiciary Act of March 3, 1891, Chap. 517, 26 Stat. 826, which created the circuit courts of appeals, provided them with an appellate jurisdiction in criminal cases, and by its terms did not expressly limit the right of appeal to defendants. Nevertheless this Court held:

> "In none of the provisions of this Act, defining the appellate jurisdiction, either of this court, or of the Circuit Court of Appeals, is there any indication of an intention to confer upon the United States the right to bring up a criminal case of any grade after judgment below in favor of the defendant. It is impossible to presume an intention on the part of Congress to make so serious and far-reaching an innovation in the criminal jurisprudence of the United States." *United States* v. *Sanges, supra* at 323.

If it is "impossible to presume an intention on the part of Congress" to create an appeal on the part of the Government, which would be "so serious and far-reaching an innovation in the criminal jurisprudence of the United States," surely it cannot be inferred that at this juncture in history there was any intention to allow such review through the use of prerogative writs.

The first time Congress seriously considered giving the

Government any right to review was in 1906. In that year, a bill was passed by the House providing:

> "That in all criminal prosecutions the United States shall have the same right of review by writ of error that is given to the defendant, including the right to a bill of exceptions: *Provided,* That if on such writ of error it shall be found that there was error in the rulings of the Court during the trial, a verdict in favor of the defendant shall not be set aside." (H. R. 15434, as passed by House).[4]

The goal of the House bill was to allow review of errors, so that there would be appellate precedent, without in any way affecting the rights of the defendant in the particular case. His favorable disposition would not be set aside, but the appellate court could pronounce its judgment on the issues involved so as to govern future cases.[5]

The bill was then sent to the Senate. The Senate Judiciary Committee completely revised the bill, so that it allowed review to the Government in only the limited instances for which legislation was being sought by the Attorney General: demurrers to indictments, motions to quash or set aside indictments, and pleas in bar and arrests of judgment based on the factual or legal insufficiency of the indictment.[6] Discussions on the floor of the Senate by spokesmen for the revised bill made clear that review was limited to the enumerated instances because (1) there was fear that the procedures in the House bill would not constitute a "case or controversy" or would be "moot"; and (2) the enumerated instances were the only ones in which an exception to the existing rule of non-reviewability was necessary.[7]

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[4] 40 Cong. Rec. 5408 (1906).

[5] H.R. Rep. No. 2119, 59th Cong., 1st Sess. 3 (1906)

[6] S. Rep. No. 3922, 59th Cong., 1st Sess. (1906)

[7] See, *e.g.*, 41 Cong. Rec. 2752-53 (1907) (remarks of Senator Patterson); 41 Cong. Rec. 2821 (1907) (remarks of Senator Bacon).

The Senate's revised bill, as reported from Committee, contained no proviso expressly protecting verdicts of acquittal from review. Spokesmen for the Senate revision indicated that the proviso had been omitted inasmuch as (1) the limited instances of review provided could not possibly include any situation in which a verdict of acquittal had been obtained;[8] and (2) double jeopardy would make unnecessary any Congressional disallowance of such review.[9]

Nevertheless, perhaps out of abundance of caution, an amendment was proposed which was substantially identical to the House proviso.[10]

The proponent of the amendment, answering the arguments that double jeopardy made it unnecessary, stated:

> "But once tried and once acquitted, no matter on what point tried and acquitted, that ought to be the end of that man's trial. I have not used the word 'jeopardy' in the amendment. I want to steer clear of it. I am afraid of it.
>
> * * *
>
> "But when a man has been once tried and once acquitted that ought to be the end of it, jeopardy or not." [11]

Although there was considerable skepticism as to the necessity for the amendment, expressed throughout its debate, it was ultimately adopted in the following form:

> "*Provided,* that no writ of error shall be taken or allowed the United States in any case where there has been a verdict in favor of the defendant." [12]

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[8] See, *e.g.*, 41 Cong. Rec. 2762 (1907) (remarks of Senator Spooner).

[9] See, *e.g.*, 41 Cong. Rec. 2753 (1907) (remarks of Senator Patterson).

[10] 41 Cong. Rec. 2745 (1907) (remarks of Senator Rayner)

[11] 41 Cong. Rec. 2747, 2748 (1907) (remarks of Senator Rayner)

[12] 34 Stat. 1246 (1907).

A subsequent amendment limited the Government's right to obtain review by further narrowing the grounds of appeal exclusively to instances where the judge's action was based on Constitutional or statutory construction grounds.[13]

As so amended, the revised bill passed the Senate.[14] In conference, the House accepted the Senate's revisions [15] and the bill became law. Act of March 2, 1907, 34 Stat. 1246.

This Act, which specifically precluded the setting aside of verdicts in favor of the defendant, clearly expressed a Congressional policy antagonistic to any review of such verdicts. Indeed, the statement of Senator Knox, a former Attorney General of the United States, and a prinicpal spokesman for the Act, makes clear that Congress was opposed to any review of occurrences at the trial favorable to the defendant:

> "These proceedings [made reviewable by the Act] are all defendant's acts before a verdict to prevent a trial, except the motion in arrest of judgment, which is defendant's act after a verdict against him to defeat a judgment on the verdict. These motions of defendant rest upon the want of jurisdiction of the court, the unconstitutionality of the statute, or some other lack of right to proceed to trial or to judgment on the verdict, the effect of all of which is to defeat the jeopardy. *Mark this: It is not proposed to give the Government any appeal under any circumstances when the defendant is acquitted for any error whatever committed by the court.*" [16]

And this Court, in *United States* v. *Keitel,* 211 U. S. 370,

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[13] 41 Cong. Rec. 2820 (1907)

[14] 41 Cong. Rec. 2825 (1907)

[15] See H.R. Rep. No. 8113, 59th Con 2d Sess. (1907)

[16] 41 Cong. Rec. 2752 (1907) (remarks of Senator Knox; emphasis supplied). To the same effect are the remarks of Senator Patterson: "Under the Senate bill there can be nothing which occurred on the trial submitted to the appellate court." 41 Cong. Rec. 2752 (1907)

398-99 (1908), held that Congress intended to confine the Government's right to review to the specifically enumerated instances set out in the Act:

> "That Act [of 1907], we think, plainly shows that, in giving to the United States the right to invoke the authority of this court by direct writ of error in the cases for which it provides, it contemplates vesting this court with jurisdiction only to review the particular question decided by the court below for which the statute provides. In other words, that the purpose of the statute was to give the United States the right to seek a review of decisions of the lower court concerning the subjects embraced within the clauses of the statute, and not to open here the whole case. *We think this conclusion arises not only because the giving of the exceptional right to review in favor of the United States is limited by the very terms of the statute to authority to re-examine the particular decisions which the statute embraces, but also because of the whole context, which clearly indicates that the purpose was to confine the right given to a review of the decisions enumerated in the statute, leaving all other questions to be controlled by the general mode of procedure governing the same.*" (Emphasis supplied.)

This was reaffirmed in *United States* v. *Dickinson,* 213 U. S. 92, 103 (1909):

> "So far as that statute [Criminal Appeals Act of 1907] is an innovation in criminal jurisdiction in certain classes of prosecutions it cannot be extended beyond its terms."

And recently, this Court again pointed to the clear Congressional policy opposed to review in the areas involved in this case. *Carroll* v. *United States,* 354 U. S. 394 (1957):

> ". . . [I]n the federal jurisprudence, at least, appeals by the Government in criminal cases are something

unusual, exceptional, not favored. The history shows resistance of the Court to the opening of an appellate route for the Government until it was plainly provided by the Congress, and after that a close restriction of its uses to those authorized by the statute. . . . When the Congress responded to the problems of such cases [prosecutions dismissed because of construction or invalidating of statute], in the Criminal Appeals Act of 1907, now 18 U. S. C. §3731, *it did so with careful expression of the limited types of orders in criminal cases as to which the Government might thenceforth have review. . . .*" 354 U. S. at 400-02.

"The legislative history emphasizes the awareness of the Congress that Government appeals in criminal cases were a sharp innovation and congressional concern that such jurisdiction should go no further at that time than the immediate problem of affording review for trial court opinions as to the construction or validity of federal statutes." 354 U. S. at 402 n. 11. [Emphasis supplied.]

No changes were made in the Criminal Appeals Act until 1942. At that time, the Attorney General requested amendments which would, in major part, merely extend the enumerated grounds for appeal to instances where the basis for the judge's action was other than the Constitution or statutory construction.[17]

In his letter requesting these changes, the Attorney General reiterated the position that the Act must not provide for review of verdicts of acquittal:

"Such right should, of course, be limited to cases in which there has not been a verdict in favor of the defendant, for in such an instance the rule against double

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[17] In one other substantive change, informations as well as indictments were sought to be made reviewable.

jeopardy would conclusively bar the Government against securing a review." [18]

Despite this declared purpose to preserve the intent of the proviso inserted into the 1907 Act, the Attorney General, without explanation, eliminated the proviso from his draft bill.[19] That draft bill, with changes not relevant here, was enacted by both Houses without floor debate in either House.[20] Act of May 9, 1942, 56 Stat. 271. Nowhere in the Committee reports is any reason given for the elimination of the proviso.[21]

In light of the Attorney General's clear intention that there be no review of verdicts favorable to the defendant, we believe his omission of the proviso was due either (1) to his belief that it was unnecessary, since double jeopardy, in his own words, "would conclusively bar the Government against seeking a review", or (2) to a quite reasonable conclusion that by the limited terms of the Act, no verdict favorable to the defendant could possibly be reviewed thereunder.

In any event, the amendment in 1942 can in no way be construed as a departure from the theretofore clear Congressional policy that verdicts favorable to the defendant are not reviewable.

Subsequent minor changes in the language of the statute, in 1948 to conform its language to Rule 12 of the Federal

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[18] Letter, Attorney General to Speaker of the House, printed in H.R. Rep. No. 45, 77th Cong., 1st Sess. 2 (1941). We wish to note that the Attorney General spoke in terms of a bar to *review*, not merely to appeal.

[19] The Attorney General's draft bill was reported "favorably thereon without amendment," and without the proviso. H.R. Rep. No. 45, 77th Cong., 1st Sess. 1 (1941).

[20] 87 Cong. Rec. 1067 (1941) (House); 87 Cong. Rec. 9769 (1941) (Senate, with changes); Conference Report agreed to, 88 Cong. Rec. 3892 (1942) (Senate); 88 Cong. Rec. 3949 (1942) (House).

[21] See H.R. Rep. No. 45, 77th Cong., 1st Sess. (1941); H.R. Rep. No. 2052, 77th Cong., 2d Sess. (1942).

Rules of Criminal Procedure,[22] and in 1949 to conform its language "to the nomenclature of the courts",[23] did not constitute substantive changes.

What conclusions, then, can be drawn from this history? First, that the Criminal Appeals Act is a very limited encroachment on the pre-existing rule that the Government may not seek review in criminal cases, and second, that Congress (and the Attorney General in 1942) were explicit in opposing review of judgments of acquittal.

The Acts of 1889 and 1891, by granting defendants a full right of appeal, constitute a basis for finding the "all writs" provision applicable at the petition of the defendant. And the Act of 1907, as amended, constitutes a basis for finding the "all writs" provision applicable at the request of the Government to occurrences prior to trial or after conviction, similar to those made directly appealable. But all these statutes manifest a clear Congressional opposition to review at the Government's request of occurrences at the trial or of judgments of acquittal, and can hardly be deemed a basis for finding the "all writs" provision, which was not applicable to judgments of acquittal before these statutes were passed, applicable to them now.

In its brief below, the Government conceded that the principle we propose is applicable to judgments of acquittal rendered at the close of the Government's case: "The refusal of Congress to provide for the review of such judgments requires the inference that Congress did not intend that appellate courts should attempt to distinguish arbitrary acquittals and those which are merely erroneous." (Gov't brief below, p. 10). The principle is equally applicable, of course, to judgments of acquittal rendered prior to the close of the Government's case, for Congressional refusal to provide re-

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[22] Act of June 25, 1948, ch. 645 62 Stat. 844 (1948), 18 U.S.C. §3731 (1948). See *United States* v. *Pack*, 247 F.2d 168, 171 (3 Cir. 1957).

[23] Act of May 24, 1949, ch. 139, 63 Stat. 97.

view of judgments of acquittal has been unlimited in scope.

All the criminal cases we have found in which this Court has authorized review by prerogative writ have dealt with occurrences prior to trial or after conviction. Thus this Court has approved the use of prerogative writs to compel a trial judge to issue a bench warrant, long before trial, *Ex parte United States,* 287 U. S. 241 (1932), to prohibit a trial judge from suspending a mandatory sentence, after conviction, *Ex parte United States,* 242 U. S. 27 (1916), or from granting a new trial after a conviction has been affirmed on appeal, *United States* v. *Smith,* 331 U. S. 469 (1947); and to set aside the vacation of a judgment of conviction after the expiration of the term in which the judgment of conviction was entered, *United States* v. *Mayer,* 235 U. S. 55 (1914).

But the court below, in relying on certain of these cases as controlling in the instant action, overlooked the basic distinction between such cases, where the non-availability of direct appeal was "due to a lacuna attributable to the scope and coverage of the jurisdictional statutes" [24] and one, such as here, where "it is clear that there is a statutory policy, against appellate review of that judgment." [25] That distinction, as we have shown, is crucial.

We wish to comment briefly upon two other cases which, though not relied upon by the court of appeals, were cited by the Government in its brief below.

In *Ex Parte United States,* 101 F.2d 870 (7th Circuit 1939), *aff'd by an equally divided Court, sub nom. United States* v. *Stone,* 308 U. S. 519 (1939), the Government sought mandamus to review the judge's dismissal of an action rendered after a jury's verdict of conviction. The court of appeals held that the judge had acted within his powers, hence mandamus would not lie. The Government

[24] 6 Moore, Federal Practice ¶54.10[2], p. 67 and cases cited, n. 42.

[25] 6 Moore, Federal Practice ¶54.10[2], p. 67 and cases cited nn. 41 and 55.

cited this case for the proposition that mandamus is available to review verdicts "favorable to the defendant." The court of appeals did state in passing, and without consideration of the problems suggested above, that it could set aside the trial judge's order if he had exceeded his power in granting it, a statement which we believe is erroneous. But even that statement is of doubtful value to the Government in this case, since the court went on to hold that the district court has unlimited "inherent" power to enter judgments of acquittal.

In *United States* v. *Waters,* 175 F.2d 340 (D.C. Cir. 1948), the trial judge, after the jury had returned a verdict of guilty, had granted a judgment of acquittal on the ground that the indictment was insufficient. The rules provide for the entry of an arrest of judgment in such a situation, Fed. R. Crim. Proc. 34, which would be appealable, 18 U. S. C. § 3731. The Government appealed, and the court, on a motion to dismiss the appeal, held that "we must be guided in determining the question of appealability of the trial court's action not by the name the court gave it but by what in legal effect it actually was. It actually was an arrest of judgment." It further held that the substantive issue raised by the Government on the appeal was one involving the construction of a statute, and that therefore the appeal should have been taken to the Supreme Court rather than to the court of appeals. In accordance with the Criminal Appeals statute, the court certified the case to the Supreme Court where, without explanation, it was dismissed on motion of the Government. 335 U. S. 869 (1948).

The decision of the court of appeals in that case, even if correct, would not be of help to the Government here. The court there relied on the fact that the judge had unequivocally indicated that he was only ruling on the sufficiency of the indictment, and held that such a ruling is appealable under the Criminal Appeals act irrespective of how it is labelled. In the present case, the trial judge ruled that the

testimony of the Government's own witnesses and the conduct of the prosecutor had rendered the Government's case so defective that it should not be permitted to go to the jury. Such a ruling, however labelled, is precisely the type of event occurring in the course of a trial (rather than prior thereto or after a verdict if guilty) which is not subject to appeal or other review. Thus, even if *Waters* was correct in holding that it is the substance of a ruling, rather than the label attached to it, that determines its reviewability, the ruling in this case could not be reviewed.

Moreover, the *Waters* decision is in direct conflict with the unanimous decision of this Court in *United States* v. *Weissman*, 266 U. S. 377 (1924). In that case, as in *Waters*, the judge had directed a verdict of not guilty on the ground that the indictment was insufficient to charge a violation. And the Government in that case made precisely the same argument as was made in *Waters* — "that the judgment should be treated in substance as sustaining a demurrer to the indictment or quashing it." 266 U. S. at 378. In rejecting that argument this Court, speaking through Mr. Justice Holmes, held:

> "But we are of opinion that no such narrowing construction can be put upon the Criminal Appeals Act for the purpose of enlarging the Government's right to review. The words [of the Criminal Appeals Act as it stood at that time], taken literally, refer simply to the matter of fact that there 'has been a verdict,'- not qualified by any consideration of whether it was right or wrong . . .
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> "It is suggested that the course adopted in this case offers to the lower court a means of escaping the review allowed by the act; and there is an innuendo that there was a desire of that sort below. But such considerations do not affect the construction of the act, and it is fair to say that while the judge should not have directed a verdict when he did so, and, if he thought

> the indictment bad, should have quashed it before the jury came in, and left the question in form to be taken up, still we see no sufficient reason for supposing that the direction was given with any notion of escaping the jurisdiction of this court."

We submit, therefore, that the holding of the court below that a judgment of acquittal can be set aside by writ of mandamus is wholly unsupported by the precedents, and runs directly counter to the entire legislative history of the various statutes governing review in criminal cases. Even if the trial judge exceeded his power in entering the judgment of acquittal, therefore, it was error for the court of appeals to exceed its jurisdiction by setting that judgment aside. In the words of a recent note in the *Yale Law Journal*, which criticizes the opinion below on this ground:

> "The necessity for close adherence by courts to the congressional policies concerning criminal appeals embodied in statutes defining the jurisdiction of appellate courts should be apparent. Federal courts are courts of limited jurisdiction: the limits on jurisdiction represent that distribution of judicial power in our federal system which is deemed optimal by Congress . . . Disavowal of jurisdictional power, in any given case, may offend an appellate court's sense of substantial justice, because of the possibility that rigid adherence to limits couched in jurisdictional terms may permit errors below to remain unrectified. Nevertheless, the arguments which favor appellate intervention in 'appropriate' cases must be balanced against the fact that appellate transgressions of jurisdictional limitations may be no less 'usurpations of power' than those actions by trial courts which prompt such unauthorized review." Note, *Mandamus to Review Judgments of Acquittal in Federal Courts*, 71 Yale L.J. 171, 177-78 (1961).

In this case, we fear, the Court of Appeals was misled

by what it conceived to be "the relative magnitude of the district court's error" [26] into a failure to respond to the demands of self-restraint imposed by a clear Congressional policy against review of judgments of acquittal.

III—THE TRIAL JUDGE DID NOT EXCEED HIS POWER IN RENDERING THE JUDGMENT OF ACQUITTAL

If the arguments we have made so far are correct, the court below need never have reached the issue of whether the trial judge exceeded his power in granting the judgment of acquittal, and this Court need not reach it. On the other hand, if, as we believe, the trial judge did not exceed his power, this in itself is a sufficient ground for reversing the decision of the court of appeals.

At the risk of being accused of "bootstraps" reasoning, we must point out that in a very real sense the arguments which we have already made are dispositive of the "power" question as well. The power of a federal judge, after all, must be determined with reference to the federal statutes, the Constitution, and the relevant common law traditions. The consistent Congressional hostility to any judicial review of judgments of acquittal, the constitutional protection against double jeopardy, and the common law background out of which that constitutional principle developed, all lead unavoidably to the conclusion that the power of a trial judge to acquit defendants who are properly before him is absolute.

The Government, we have seen, conceded in its brief below that there are no limits on the power of a judge to render judgments of acquittal after the close of the prosecution's case, "because the refusal of Congress to provide for

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[26] Concurring opinion of Judge Aldrich, in Court below (R. 62).

the review of such judgments requires the inference that Congress did not intend that appellate courts should attempt to distinguish arbitrary acquittals from those which are merely erroneous." (Gov't Br. below p. 10.) That argument, we have shown, applies equally to acquittals rendered at an earlier stage in the trial, since there is no basis for inferring that Congress intended them to be any less immune from review.

The power of a trial judge to render an acquittal has rarely even been challenged. Moreover, the few cases which have had occasion to deal with this issue all support the view that there are no limits on that power.

In *United States* v. *Weissman,* 266 U. S. 377 (1924) this Court held that a judgment of acquittal based on a holding that the indictment was insufficient was effective as an acquittal, even though no evidence had been introduced, and even though the proper action would have been to quash the indictment. The language of the opinion clearly implies that the sole test of the judge's "power" is whether he had jurisdiction over the subject matter and the parties:

> "Furthermore, if directing the verdict was wrong, it certainly was not beyond the jurisdiction of the court. The jury was there and the prisoners before them; and, so far as jurisdiction is concerned, it did not matter whether the evidence had been put in or not. We stop at the point of jurisdiction, the want of which would be the only pretext that could be offered for going behind the literal meaning of the statute. But we do not mean to imply that an opening by counsel or the offer of evidence is necessary to justify directing a verdict of not guilty; there are other cases in which it is done." 266 U. S. at 379.

In *Ex Parte United States,* 101 F.2d 870, 878 (7th Cir. 1939), *aff'd by an equally divided court, sub. nom. United States* v. *Stone,* 308 U. S. 519 (1939) the court held that

a trial judge has power to render a judgment of acquittal *non obstante veredicto,* even though the federal rules at the time did not expressly provide such a power, relying in part on the view that

> "In the absence of prohibitive legislation courts have inherent power to provide themselves with appropriate procedures for the performance of their tasks. Ex parte Peterson, 253 U. S. 300, 312, 313 . . . Funk v. U. S., 290 U. S. 371, 381-84 . . ."

Also relevant is the following statement of the court in *United States* v. *Heath,* 260 F.2d 623, 626 (9th Cir. 1958):

> "To prevent possible prejudice on trial beyond the general atmosphere of impartiality which traditionally pervades the courtroom, trial judges have wide discretion to methods of control. Among these are direction of mistrial, order to the jury to return verdict of acquittal and grant of new trial."

The danger that a trial court will abuse such broadly defined power is, we suggest, much less than the danger that any limitation of that power might render the court unable effectively to protect the rights of the accused. There already is some evidence that courts are over-cautious, rather than over-generous, in the exercise of the power to acquit. See Comment, *The Motion for Acquittal: A Neglected Safeguard,* 70 Yale L.J. 1151 (1961). And, after all, there are no limits on the power of the prosecution to "acquit" a defendant by entering a *nolle prosequi* in the interests of justice. Why should judges not be trusted with a similar power, particularly since it is they, not the prosecutors, who are the ultimate guardians of our liberties?

We believe, in short, that there are no limits to the trial judge's power to acquit. But, even if limits exist, they were not exceeded in this case.

We start with the proposition which was acknowledged

by the court of appeals, that mandamus does not lie to correct error, no matter how extreme. Questions such as whether the trial court's decision was right or wrong, or whether or not it would have been sustainable on appeal if appeal had been available, should not have been considered by the court of appeals. The standards which apply in review by mandamus have been clearly expressed in *Johnston* v. *Marsh,* 227 F.2d 528, 531 (3 Cir. 1955):

> "A judge having authority to act in a particular matter has, of course, the power to decide correctly or to make mistakes . . . But the fact that a court in the first instance decides a matter in a way which a court on appeal thinks incorrect is not a denial of the authority of the trial judge. We are not for a moment suggesting that the district court here did make a mistake. Neither are we saying that he was right. That point is not now before us. What we are deciding is that the court was acting within its jurisdiction. Since it was acting within its jurisdiction the writs prayed for are inappropriate because prohibition and mandamus only run against the judge when he has acted beyond his judicial authority or has refused to act within it."

Although the court below acknowledged the existence of this basic distinction, it is clear that the court ultimately set the acquittal aside because it thought the trial court had erred. In the words of Judge Aldrich's concurring opinion, "the court has been misled by the relative magnitude of the district court's error into confusing a difference in degree with a difference in kind." (R. 62).

The court did not hold that a trial judge cannot enter a judgment of acquittal for what he considers to be defects in the evidence prior to the close of the prosecution's case,[27]

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[27] ". . . perhaps, as the Government concedes, although again we do not need to decide and do not decide, judgment of acquittal might

but only that it was improper to do so on the facts of this case.[28] Nor did it hold that a trial judge cannot acquit because of misconduct by the prosecutor,[29] but only that in this case the judge erred in concluding that what the prosecutor had done was improper, and that even if it were improper, the only appropriate remedy would have been an order of mistrial.[30]

In other words, the court of appeals simply concluded that the judge's decision was not supported by the record. In our view, a judge lacks power only if he could not have done what he did on *any* record. To say, as the court below did, that the trial judge acted improperly on *this* record, is not to say that he exceeded his power but simply that he committed error.

Thus, if there are any limits at all on the power to acquit, the critical questions which must be asked in this case to determine whether the trial judge exceeded his power are

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properly be entered in some situations even before the close of the Government's case, as, for instance, when the Government's opening statement unmistakably shows that the evidence it proposes to introduce would not sustain a conviction, or when it produces evidence conclusively showing either that it has no case or that the accused has an iron-clad defense." (R. 54-55)

[28] "But there is no suggestion of any such situation here, for the judge abruptly terminated the Government's case by ordering the entry of a judgment of acquittal on evidence showing no defense and long before the Government had had an opportunity to show whether or not it had a case; and, moreover, he did so in ignorance of either the exact nature or the cogency of the specific evidence of guilt which Government's counsel said he had available and was ready to present." (R. 55)

[29] "Conceivably, although we have no occasion to decide and do not decide, a judgment of acquittal might be warranted in the event that deliberate misconduct of Government counsel is so outrageous as not only to render the trial in progress unfair but also to make a fair trial in the future impossible." (R. 54 n. 5)

[30] "The Assistant United States Attorney was not guilty of any misconduct or impropriety, and even if he had been it would seem that the most the defendants would be entitled to would be an order of mistrial." (R. 53-54)

precisely the ones the court of appeals avoided: may a judge acquit the defendants before the prosecution has rested if he finds, however erroneously, that the evidence is fatally defective, and may he do so when he finds, however erroneously, that there has been misconduct by the prosecutor which in his judgment justifies such action. We believe that the answer to both of these questions must be yes.

As to the first, we believe Judge Aldrich's concurring opinion below to be unanswerable. As he pointed out, it is well-established that a judgment of acquittal can be entered when the prosecutor concedes a critical fact in his opening statement, *United States* v. *Dietrich,* 126 Fed. 676 (C.C.D. Neb. 1904); *McGuire* v. *United States,* 152 F.2d 577, 580 (8th Cir. 1955), or in a stipulation, *United States* v. *Maryland Co-operative Milk Producers, Inc.,* 145 F. Supp. 151 (D.D.C. 1956). It follows, he said, "that if the court can make such a decision *in medias res* when its opinion of the damaging effect of particular facts is correct, it can equally do so when its interpretation is incorrect . . . given power to decide, there must be power to decide erroneously." He then argues:

> "There can be no doubt that even if a court found no conceded fact, as in the *Maryland Cooperative* case, fatal to the government, but nevertheless was of the opinion that the government's evidence was so unreliable and vacillating as to be utterly unworthy of belief, it could order an acquittal at the close of the government's case. The government could not appeal, no matter how erroneous the court's determination. I cannot think that a court is entirely without power to reach the same conclusion before the last witness has testified. It is not always necessary to eat the whole of an egg to know it is rotten. The fact that the court is obliged to put the defendant to the bar, *Ex parte U. S.,* 1932, 287 U. S. 241, seems a far cry from saying that it cannot, in a bona fide attempt to

weigh evidence introduced, conclude that what it holds to be a vital part thereof is so irretrievably bad that no jury could properly convict.

"Suppose here that instead of ordering an acquittal forthwith the court had stated that under the circumstances then disclosed all of the remaining evidence offered by the government must be excluded as irrelevant. Manifestly, the power to exclude evidence as irrelevant exists at all times. The government, perforce, would then have rested, and the court's power to acquit would have become absolute. In what way was the court's ruling (if the unreliability of the evidence was its reason for acquittal rather than government counsel's alleged misconduct) other than that evidence already introduced so fatally infected the case that all further evidence was irrelevant in the sense that it could not cure the defect? To say that this was done without sufficient consideration is not to say that it was done without power. I believe this court has been misled by the relative magnitude of the district court's error into confusing a difference in degree with a difference in kind." [31] (R. 60-62)

We believe that similar reasoning is applicable to the question of whether a judge has power to acquit when he believes that there has been misconduct of the prosecutor.

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[31] As Judge Aldrich pointed out, and as the Government conceded below, Rule 29 (a) of the Federal Rules of Criminal Procedure cannot be construed as limiting a trial judge's power to acquit prior to the close of the Government's case. That rule simply *requires* the judge to acquit at the end of the prosecution's case if he finds the evidence insufficient to sustain a conviction. It does not *prohibit* such action at an earlier stage of the trial, or on other grounds which might be sufficient in law. The Notes of the Advisory Committee on Rules state that the rule "substantially continues the existing practice." There is no indication, in short, that the rule was intended to limit the power of a trial judge to render a judgment of acquittal, and, indeed, it is questionable whether it could validly do so. *Cf. United States* v. *Bink*, 74 F. Supp. 603 (D. Ore. 1947).

Surely a judge has the power to rule on the propriety of the prosecutor's conduct. He therefore has the power to conclude, however erroneously, that particular conduct was improper. And if he also believes that there is no other effective way to remedy the misconduct he must have the power to grant an acquittal. *Cf. Jencks* v. *United States,* 353 U. S. 657 (1957)

Assuming, as we must, that the judge was correct in concluding that the prosecutor's conduct in talking to the witness after he had taken the stand was improper, the view that the only effective remedy would be an acquittal was not unreasonable. As we have seen, a mistrial would not have helped the situation, since it would merely have given the prosecutor a chance to prepare a better case. And while the judge might perhaps have struck the affected testimony, it is not uncommon for a judge to believe that what can be stricken from the record cannot be stricken from the jurors' minds.

In other words, the trial judge, faced with motions for a judgment of acquittal, had a number of issues to decide. He not only had the power to decide them, he had the obligation to decide them. That is the function of a trial judge. These issues included:

1. Was the evidence already presented so defective that no jury could possibly convict?
2. Was it misconduct for the prosecutor to talk to a witness outside the hearing of the judge and jury, to accomplish a change in the witness' testimony, after the witness had taken the stand?
3. If it was misconduct, was there any effective way to remedy the harm done short of entering a judgment of acquittal?

Whether or not the judge's decision on any or all of these issues was wrong, we cannot see how it can seriously be contended that he lacked power to decide them. And, of course,

the power to decide must include the power to act on the basis of that decision.

Thus this case is not, as the Government suggested below, comparable to a case in which a trial judge acquits the defendants because of his friendship for them, or for some similar reason. The judge here acted in good faith in a conscientious attempt to perform his judicial function as he understood it. The reasons he gave for his action were the kind of reasons which, in appropriate circumstances, would justify such action. That being so, the judge, whether or not he committed error, cannot be said to have exceeded his power.

CONCLUSION

For the reasons stated, the judgment of the court of appeals should be set aside, and the case remanded with directions to dismiss the petition for mandamus.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 65

STANDARD COIL PRODUCTS CO., INC.,

Petitioner,

—v.—

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR STANDARD COIL PRODUCTS CO., INC.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 65

STANDARD COIL PRODUCTS CO., INC.,

Petitioner,

—v.—

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR STANDARD COIL PRODUCTS CO., INC.

Opinions Below

The district court's statement directing the jury to return a verdict of acquittal appears at R. 572-575; it is not officially reported. The opinions of the circuit court below and that of the concurring circuit court judge are reported in 286 F. 2d 556, R. 45-65.

Jurisdiction

The jurisdiction of this Court to review the judgment of the circuit court below is invoked by petitioner under 28 U. S. C. §1254(1). The petition for a writ of certiorari was filed on March 7, 1961 and granted on June 19, 1961.

Questions Presented

Whether it was proper for a circuit court of appeals to issue a writ of mandamus vacating a judgment of acquittal directed by a district court on the eighth day of a criminal trial where the district court had concluded prior to the close of the Government's case that there had been testimonial deficiencies on the part of key Government witnesses, improper conduct by Government counsel with respect to a vital aspect of one part of the Government's case and that an acquittal was required in the interests of justice.

Whether, on the above facts, jeopardy attached within the meaning of the Fifth Amendment, so as to bar the circuit court from issuing mandamus vacating the judgment of acquittal and ordering a new trial.

Constitutional Provision, Statutes and Federal Rules Involved

U. S. CONST. amendment V provides in pertinent part:

> " . . . nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; . . . ."

The applicable provisions of the following statutes and Federal Rules of Criminal Procedure are quoted *infra* in Appendix A:

"All writs" statute, 28 U. S. C. §1651(a).
Criminal Appeals Act, 18 U. S. C. §3731.
Federal Rules of Criminal Procedure, 29(a) and 37(a).

Statement

Proceedings Before the District Court

An indictment in nine counts was returned on January 15, 1960 by a federal grand jury in the District of Massachusetts against petitioner Standard Coil Products Co., Inc. and two of its employees (R. 6-23). Petitioner and the individual defendants, together with various named and unnamed alleged co-conspirators, were charged with having fraudulently concealed and conspired to conceal, in violation of 18 U. S. C. §§371 and 1001, during the period from September 1956 to November 1957, material facts relating to the falsification of the testing of devices known as radiosondes,* which were being manufactured by petitioner under two successive contracts for the Army Signal Supply Agency.

Pursuant to the indictment, the defendants were brought to trial in the District Court for the District of Massachusetts before the Honorable Charles E. Wyzanski, United States District Court Judge for that district. The District Court had unquestioned jurisdiction over the defendants and the offenses charged. A jury was impaneled on September 8, 1960 (R. 75), and the Government attorney made an opening statement to the jury (R. 69-74) and thereafter commenced the Government's presentation of evidence and witnesses (R. 75, *et seq.*).

The prosecution's opening indicated that the Government's presentation would be in two stages, the first consisting of evidence as to "how the tests were supposed to be run" (R. 72), and the second stage encompassing "the

* A radiosonde is an electronic device designed to be parachuted from an airplane which furnishes, by means of continuous radio signals in Morse Code emitted during its descent, temperature, pressure and humidity weather information

charges of the indictment and what the government will prove was done wrong" (R. 72). The court and jury were further informed by the prosecution's opening (R. 70):

> "Before you can follow the testimony about the falsification of the tests you will have to know something about the instrument involved, how it was made and how it was to be tested . . ."

The first Government witness who testified was one Paliatto whom the trial court considered to be the Government's principal witness (R. 359).* Although the prosecuting attorney disputed this (R. 359), the record discloses that Paliatto was the chief Government inspector at petitioner's plant (R. 81, 254); he had determined which radiosonde units were to be tested (R. 156-57, 177); he had designated the extent of testing that petitioner was required to perform (R. 308, 309); he had full responsibility for seeing that the tests were conducted properly (R. 274); and he had initiated the F.B.I. investigation leading to the indictment (R. 353-54). Moreover, Paliatto was to testify both as an "expert" on how the tests were supposed to be conducted and on his "specific" knowledge of alleged acts of improper testing (R. 80, 365).

Paliatto testified as to the first part of the Government's case for almost six full trial days (R. 79-480). During the course of his testimony the trial court found it necessary to ask him numerous questions designed to elicit intelligible explanations concerning the radiosonde and its complicated testing procedures. Full opportunity was given the witness to clarify and explain his testimony, including several recesses declared by the trial judge during Paliatto's direct examination to enable him and Government counsel to simplify explanations of technical matters (R. 117-118, 148, 172).

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* The circuit court also referred to Paliatto and Rosenholm as "principal witnesses." (268 F. 2d at 560, R. 50).

At the end of the second day of Paliatto's testimony the trial judge stated that he was "quite prepared to take drastic action" if by the next trial day the Government's case were not better prepared as to the technical matters so that the jury could get a "fair picture" (R. 172). Prior to this time and on several subsequent occasions, Paliatto's testimony caused the trial judge to caution the witness to think before he testified and to consider more carefully his testimony and its significance in view of the gravity of a criminal proceeding (R. 151, 166, 313-314, 328, 352, 478).

On the third day of the trial Paliatto testified that the allegedly falsified test results were embodied in tapes which, after completion of each test series, had been delivered to him (R. 179-180). Subsequently, on the fifth day of the trial, Paliatto admitted that he had destroyed some of his records but first testified that none of these were pertinent to radiosondes (R. 352). However, a few moments later he admitted that he had destroyed radiosonde test tapes but denied that he had done so after the F.B.I. investigation was initiated (R. 353). Upon further questioning, he finally admitted that he had destroyed these tapes after he had made his complaint to the F.B.I. (353, 357, 358). At this juncture, the trial court excused the jury and recommended to the United States Attorney that it would be in the public interest to *nolle prosse* the case against the defendants (359-364). The trial judge, during this conference at the bench, expressed the opinion that Paliatto's testimony was not trustworthy and could not be given any credit (R. 360, 362). The judge further stated that he did "not believe that there is a chance that this Jury will convict these defendants" (R. 364), and that even if in the unlikely event the jury were to believe Paliatto and return a verdict of conviction it would be "almost inevitable" that he would have to set aside such a verdict (R. 362).

Notwithstanding the trial court's recommendation, the Government proceeded with the trial. The Government's next important witness was one Rosenholm, a former employee of petitioner, who identified himself as a "final inspector of" radiosondes (R. 501). This witness had been named as a co-conspirator but not as a defendant (R. 543-544).

Rosenholm, in the trial court's opinion, proved no more reliable a witness than Paliatto (R. 573). At one point Rosenholm retracted and completely changed a segment of his testimony relevant to the Government's contention as to the manner in which a test operator was receiving information to enable her to carry out her allegedly fraudulent tests (Compare R. 543-45 with R. 546-48). This led the trial court to view his testimony as showing "either a lamentable lack of memory or an extraordinary power of inventiveness" (R. 575). Then, on the eighth day of trial, Rosenholm changed his earlier testimony with respect to the date of an alleged conversation with a representative of petitioner in order to bring the conversation within the period of the indictment (Compare R. 559 with R. 552; R. 567-68). This alleged conversation was vital to the Government's theory that petitioner had been "apprised" of the alleged acts of fraud and had thereafter conspired to conceal them (R. 557, 574). Cross examination revealed that this change in his testimony resulted from a private conference with the prosecuting attorney that very morning within an hour and a half of his resuming the stand (R. 567-68).

At this point the trial judge excused the jury and in the course of the ensuing colloquy with counsel, expressed his belief that the prosecutor had violated an "elementary rule" by "tampering" with his witness in a criminal case "*in media res*" (R. 569). The prosecuting attorney took the position that his action was in no way improper

(R. 570) but that in any event the trial should not be terminated at this stage since there were a number of other witnesses whom the Government intended to call in support of its case (R. 572). Petitioner's counsel contended that the defense had been put in "a very difficult position" and moved for an acquittal or alternatively to strike Rosenholm's testimony (R. 572). Counsel for the individual defendants joined in the motion for acquittal (R. 572). The trial court then recalled the jury and reviewed the testimonial deficiencies of the Government witnesses, the conduct of Government counsel with respect to Rosenholm's changed testimony and the significance of this change (R. 573-575). The trial judge then concluded (R. 575):

> "With due regard for the principles of justice under law, I must bear in mind not only what may be correct, but what is fair. In our constitutional system, under our jurisprudence, many things which are true are not allowed to be shown. Examples are a confession extorted by physical coercion; such a confession is not admissible although it may be perfectly correct and the defendant may be guilty. Likewise, information procured by an unlawful search and seizure may be perfectly true and the defendant may be guilty; nonetheless it is well settled that no conviction can be based lawfully upon information unconstitutionally procured by an unreasonable search or seizure.
>
> "These principles illustrate the sensitivity of American courts to fair play in connection with every aspect of the criminal law. It is not the duty of a court to see that every guilty man is punished. It is the duty of a court to see that every man gets a fair trial. The highest public interest is not the punishment of the wicked, but the establishment and maintenance of justice under law.
>
> "Bearing in mind those principles, and responding to the motions of acquittal made by counsel for the individual defendants and the corporate defendant, I direct you at this stage to return the verdicts of ac-

quittal with respect to each of the individuals and with respect to the corporation.

* * * * *

"The Court: The defendants will stand. . . . You have been acquitted by direction of the Court and by the Court. Your bail is terminated. You are free."

Judgment of acquittal was entered on September 21, 1960 (R. 37). The Government thereafter, on September 28, 1960, moved the district court to vacate its judgment of acquittal and reassign the case for trial on the grounds that (1) the court had no authority to discharge the defendants until the Government completed its evidence; (2) the judgment of acquittal, being "beyond the power of the Court and void, . . . amounted to no more than the granting of a motion for mistrial."; (3) even a mistrial was not justified under the circumstances; and (4) the Government had been "deprived of its day in Court" (R. 38-39). This motion was denied by Judge Wyzanski (R. 39).

Proceedings Before the Circuit Court

On November 3, 1960, after the expiration of the time allowed for any appeal by Rule 37(a) of the Federal Rules of Criminal Procedure if one were permissible, the Government petitioned the Court of Appeals for the First Circuit for a writ of mandamus (R. 1). The circuit court on February 2, 1961 issued the writ of mandamus sought by the Government vacating the judgment of acquittal and ordering that the case be reassigned for trial before another judge (R. 65).

The circuit court was unanimous in its opinion that the issuance of the prerogative writ was proper because the trial judge had exceeded his power in directing an acquittal and consequently the acquittal was null and void. The

circuit court, however, differed in its reasons for reaching this conclusion. The majority opinion, although it examined the details of the trial at great length (286 F. 2d at 558-62, R. 46-53) believed it not clear on the record whether the trial judge had directed the acquittal because he thought the Government's testimony "was not entitled to belief" or because "he thought the action of the Assistant United States Attorney in talking with a government witness during a recess called while the witness was on direct examination deprived the defendants of some basic civil right." In either event, the majority opinion went on to say, the trial judge's "action was not only plainly erroneous but beyond his jurisdiction" (286 F. 2d at 560, R. 50).

As to the first possible ground for the direction of the acquittal, the circuit court was extremely critical of the trial court. Although acknowledging that "The testimony of the two principal witnesses . . . was certainly confused and conflicting.", it concluded that this ". . . was due in no minor part to the trial judge's persistent, sharp and sometimes caustic cross-examination. . . ." (286 F. 2d at 560, R. 50-51.)

The majority felt that the second possible ground on which the trial court might have based its action was similarly unsupportable. It conceded that there might be some instances where deliberate misconduct of Government counsel could be considered so outrageous as to warrant a judgment of acquittal (286 F. 2d at 562, n. 5, R. 54, n. 5). But, noting that it was "at a loss to understand the basis for the judge's criticism . . . ," it concluded that on the facts of this case the prosecuting attorney "was not guilty of any misconduct or impropriety, and even if he had been it would seem that the most the defendants would be entitled to would be an order of mistrial." (286 F. 2d at 562, R. 53-54.)

Having determined that the trial court had erred, the circuit court then turned to the question of whether it had power to correct the error. It conceded that, in view of the inability of the Government to appeal, mere error committed by the trial court was not reviewable by mandamus or otherwise. The only reason for issuing the writ would be an exercise by the trial judge of a power he did not possess. Further assuming that the trial court had power to order an acquittal, under Rule 29(a) of the Federal Rules of Criminal Procedure, after the Government had closed its case, and taking note of the Government's concession that such an order might be entered before the close of the Government's case if it were clear that, irrespective of the evidence to be produced later, what had already transpired made a conviction impossible, the majority opinion concluded that under the circumstances of the present case the court had no power to enter a judgment of acquittal and that mandamus was a proper remedy to correct the purported exercise of that power (286 F. 2d at 562-565, R. 54-58). The majority based this conclusion primarily on two cases, *Ex parte United States*, 242 U. S. 27 (1916), and *Ex parte United States*, 287 U. S. 241 (1932). In the first case, which the circuit court conceded was not strictly in point, this Court had held that a district judge had no power to suspend a mandatory sentence, and that mandamus would lie to require the judge to vacate the order of suspension. Primarily relied upon by the circuit court was the observation by this Court, in that case, that if the legislative command fixing a specific punishment could be set aside it would follow that a trial judge could refuse to treat as criminal an act which the legislature had so designated (286 F. 2d at 563, R. 55-56).

More nearly in point, the court of appeals said, was the second case entitled *Ex parte United States*. In that case this Court had issued a writ of mandamus directing a

district judge to issue a bench warrant which he had refused to do despite the fact that an indictment had been returned by a properly constituted grand jury. That case, the court of appeals argued, established that the writ of mandamus was available in aid of its appellate jurisdiction and established "the necessity for issuing the writ" to confine trial judges within their jurisdictional limits (286 F. 2d at 563, R. 56). Then arguing by analogy, the court concluded that if a trial judge does not have the power to prevent the arrest of one properly accused of crime, or to refuse without valid reason to try a criminal charge, it followed that a trial judge had no power "arbitrarily to halt the trial of an accused when the government has only begun to present its evidence of guilt." "We see no difference in principle between blocking a criminal trial at the threshold and blocking it when the government has barely had a chance to put its toe in the door." (286 F. 2d at 564, R. 57-58.)

After reaching this decision that it had the power to set aside the judgment of acquittal, the circuit court proceeded to the question of double jeopardy. Admitting that it would be pointless to issue the writ of mandamus if the plea of *autrefois acquit* would be available on a second trial, it concluded that since the trial judge had no power to enter a judgment of acquittal there would be no basis for a claim of double jeopardy (286 F. 2d at 564-565, R. 58), citing *Mitchell* v. *Youell*, 130 F. 2d 880 (4th Cir. 1942). In the *Mitchell* case, the circuit court in a habeas corpus proceeding vacated a state court conviction because the prisoner had been denied counsel at his trial in violation of the Fourteenth Amendment. In so doing, the circuit court noted that a plea of double jeopardy would not lie if he was retried.

Judge Aldrich, although concurring in the result, differed sharply from the majority opinion in his reasoning.

Unlike the majority, Judge Aldrich affirmatively held that a trial court did have authority to enter a judgment of acquittal at any stage at which a fatal deficiency in the Government's evidence appeared. That being so, he concluded, and the decision of the trial judge not being reviewable, it would follow that a judgment of acquittal, no matter how erroneous, based upon the trial judge's determination that there was a fatal deficiency in the Government's case, could not be vacated by way of mandamus.

The considerations were different, Judge Aldrich argued, with respect to the claim of misconduct by Government counsel. True, the trial court clearly had the power to determine that the conduct of counsel was improper, and the power so to determine necessarily included the power to determine erroneously. But Judge Aldrich concluded that "What corrective steps the court should take after its determination of a procedural error is a separate question." Even assuming that the prosecutor had violated a rule of conduct in speaking to the witness, Judge Aldrich held that this misconduct did not justify an acquittal because it was "anything but deliberate," and it was not prejudicial to the defendants. Since the date was "a preliminary matter . . . " its "present effect . . . upon the trial was nil. Its future effect was entirely in the control of the court, who could exclude any further evidence relating to this as yet undisclosed conference." Judge Aldrich concluded that on these facts, the trial court would have no power to acquit.

Under Judge Aldrich's view, it was critical to determine whether the trial judge had entered the judgment on the basis of his conclusion concerning the evidence or on his view as to Government counsel's misconduct. Finding, as the majority was unable to do, that the record showed the trial judge had acted because of his belief that the Assistant United States Attorney had conducted himself improperly, he concurred in the judgment of the court. (286 F. 2d at 565-568, R. 59-65.)

SUMMARY OF ARGUMENT

I.

Mandamus was improperly issued by the Circuit Court.

A. The "all writs" statute, 28 U. S. C. §1651(a) (*infra*, Appendix A) empowers circuit courts of appeal to issue a writ of mandamus only when "in aid of" their appellate jurisdiction. *Roche* v. *Evaporated Milk Ass'n*, 319 U. S. 21, 25 (1943); *Whitney* v. *Dick*, 202 U. S. 132, 136-137 (1906). Any actual or potential appellate jurisdiction in the court below was extinguished by the judgment of acquittal directed by the trial court, in a case properly before it, from which acquittal the Criminal Appeals Act, 18 U. S. C. §3731 (*infra*, Appendix A) authorizes no review at the instance of the Government. Accordingly, there was no appellate jurisdiction "in aid of" which the circuit court could issue the writ.

B. The "all writs" statute permits the issuance of a writ of mandamus only if "agreeable to the usages and principles of law." The writ may not be used to review an exercise of discretion or judgment by a trial court in respect of a case properly before it. *Ex parte Perry*, 102 U. S. 183 (1879). In the present case, the district court's direction of an acquittal in response to defendants' motions constituted such an exercise of judgment. The Government's use of the extraordinary process of mandamus in this case is not to compel action by a competent tribunal, but for the improper purpose of reviewing and reversing an alleged error committed in the course of a trial. This is not the office of a writ of mandamus. *Ex parte Newman*, 14 Wall. 152, 169 (1872). Nor can the issuance of the writ in the present case be justified by labeling the judgment

of acquittal as a "mistrial." Previous similar Government attempts in criminal cases to fictitiously label judgments entered by trial courts in order to obtain a right of review for the Government have been regularly defeated by this Court. See *Carroll* v. *United States*, 354 U. S. 394, 406 (1957); *United States* v. *Carter*, 231 U. S. 492, 494 (1913). Moreover, resort to such a fiction is factually barred in the present case because at the time the acquittal was directed, the posture of the trial was such that petitioner would in no event have requested or consented to a mistrial.

C. The starting point from which the circuit court reached its final conclusion that the acquittal was a "nullity" was its opinion that the trial judge interfered with the Government's presentation of its case by his extensive questioning and had no basis for criticizing the prosecuting attorney for instigating, during a recess, a change in the testimony of an alleged co-conspirator. However, as the Government itself recognized (R. 70), it was first necessary to clearly show the proper testing procedures before the Government could hope to prove that improper tests had been made. The technical nature, combined with the ineffective presentation of the Government's case, made it the duty of the trial court to extensively question the Government's witnesses in an attempt to elicit "a fair picture" (R. 172). Moreover the record fully supports the trial court's finding that the Government witnesses "showed a lamentable lack of awareness or lack of capacity in connection with their testimonial obligations" (R. 573). Furthermore, the trial court's criticism of the conduct of Government counsel for failing to conform to the high standards of fairness required of the Government in a criminal prosecution was justified, particularly where the changed testimony of the alleged co-conspirator induced out-of-court by the Government involved the heart of the Government's

charge that petitioner had conspired to conceal the allegedly improper tests. For these reasons, the trial court, on the eighth day of trial, properly directed an acquittal in the interests of justice.

D. Assuming the trial court improperly directed an acquittal, this error was not of a jurisdictional nature. The power to decide encompasses the power to decide wrongly, no matter how serious or fundamental the error. *Lamar* v. *United States*, 240 U. S. 60, 64-65 (1916). A trial court having jurisdiction over the offense charged and the defendant, has the power to direct a judgment of acquittal at any stage of the trial. *United States* v. *Weissman*, 266 U. S. 377 (1924). A district court judge has the power to direct an acquittal even before the presentation of any evidence, *Best* v. *District of Columbia*, 291 U. S. 411, 415 (1934); *United States* v. *Heath*, 260 F. 2d 623 (9th Cir. 1958), and even after a jury verdict of conviction, *Umbriaco* v. *United States*, 258 F. 2d 625, 626 (9th Cir. 1958). It would be unreasonable and illogical to hold that this power is abated once the presentation of the evidence begins and is resurrected only when the Government concludes its case. Nor is there any support in authority or reason for depriving a trial court of power to direct an acquittal because of improper conduct by the prosecutor. The rationale of this Court's recent decision in *Gori* v. *United States*, 367 U. S. 364 (1961), is that the trial court should be left free to take such action as, in its "sensitive judgment," it believes necessary for the "more effective protection of the criminal accused."

The dangers of such judicial power being abused by whimsical or arbitrary federal trial judges are more imaginary than real. In any event, making a sacrifice of the deep-rooted principle of our criminal law which accords non-reviewable status to a judgment of acquittal,

will not give effective protection against them. On the other hand, very real dangers to the administration of criminal justice may flow from the constricted view of a trial court's power taken by the court below, opening the door wide to collateral attacks which may be brought in some other court at some unknown time in the future, on an unpredictable number of judicial rulings and decisions.

There is no validity in the Government's assertion that the trial court's direction of an acquittal should be treated as a nullity because it allegedly deprived the Government of a "fundamental" right to a jury trial. Assuming the Government has a right to a trial by jury in a criminal case, this right encompasses a trial before a judge and a jury, and even an erroneous ruling on a legal issue by a trial court which takes the case away from the jury cannot be considered a deprivation of the right to trial by jury. *Ex parte United States*, 101 F. 2d 870, 874-77 (7th Cir. 1939), *aff'd sub nom. United States* v. *Stone*, 308 U. S. 519 (1939); see *Sunal* v. *Large*, 332 U. S. 174 (1947).

Similarly without merit is the Government's contention that Rule 29(a) of the Federal Rules of Criminal Procedure was intended to be of jurisdictional stature and *sub silentio* overrule *United States* v. *Weissman*, *supra*. This Rule does not expressly limit the time at which a trial court may direct an acquittal, and accordingly, in conformity with general canons of construction applied to procedural rules or statutes pertaining to the judiciary, no such jurisdictional limitation may be read into it. *Fauntleroy* v. *Lum*, 210 U. S. 230, 234-235 (1908). Furthermore, the Notes of the Advisory Committee appended to Rule 29(a) indicate that no change in the law was intended by its adoption. Moreover, other rules governing federal criminal procedure and analogous procedural rules which have come before the courts have been held not to abrogate or circumscribe

the jurisdictional power of a trial judge, *Ex parte United States, supra; United States* v. *Apex Distributing Company,* 270 F. 2d 747, 754 n. 17 (9th Cir. 1959), and this Court has implicitly recognized the non-jurisdictional nature of Rule 29 by characterizing its violation as "an error of law." *Bryan* v. *United States,* 338 U. S. 552, 559 (1950).

E. Even in a normally appropriate situation, mandamus will not lie if appellate review is prohibited by statutory policy. In such cases, this Court has held that the statutory policy cannot be nullified through resort to mandamus in lieu of appeal. *Interstate Commerce Commission* v. *United States,* 289 U. S. 385, 394 (1933); *Ex parte Pennsylvania Company,* 137 U. S. 451 (1890). The Criminal Appeals Act contains no authorization for appeal by the Government from a judgment of acquittal. Its legislative history in the context of its common law background indicates a clear intent to confine the Government's right of criminal appellate review to those specific instances enumerated in that statute. *Carroll* v. *United States,* 354 U. S. 394, 398-407 (1957); *United States* v. *Mersky,* 361 U. S. 431, 446-453 (1960). As indicated by this Court in *United States* v. *Weissman,* 266 U. S. 377 (1924), this restrictive intent encompasses a prohibition against review of a directed judgment of acquittal, no matter how erroneous or precipitous. In view of this restrictive congressional and common law policy which is rooted in the constitutional safeguard against double jeopardy, the Criminal Appeals Act should be interpreted as prohibiting review of a judgment of acquittal by mandamus as well as appeal.

II.

Double jeopardy is a constitutional bar to the second trial ordered by the circuit court.

A. The plea of *autrefois acquit* is available to petitioner as protection against a second trial by virtue of the trial court's direction of a judgment of acquittal. The history of the plea, as incorporated in the Fifth Amendment, indicates that it is in no way impaired by any errors, irrespective of how extreme, that may have been committed in the course of a trial, including an arbitrary direction of an acquittal. *Green* v. *United States*, 355 U. S. 184, 188 (1957). State courts, which have had more occasion to consider the question of whether double jeopardy bars a second trial after an erroneous and premature direction of acquittal in the first trial, have repeatedly and uniformly held in the affirmative. The only three situations that have been recognized, either in English or American criminal jurisprudence, where a former acquittal is not a bar to a second trial, are not pertinent to the present case. Moreover, they involve situations where the defendant had never been in peril of a valid conviction or in actual danger of punishment and are, therefore, critically different from the present case where petitioner clearly was in such jeopardy.

B. Even if the acquittal directed by the district court was beyond its power or could be deemed the equivalent of an order of mistrial, petitioner may not be constitutionally subjected to a second trial. Petitioner, having been subject to the peril of a valid conviction and the actual danger of punishment, was concededly in jeopardy during the eight days of the trial and, in fact, from the time it was put to trial until the trial was terminated thirteen

days later. Furthermore, even if the acquittal, as the Government argues, be considered no more than an order of a mistrial, the result of permitting petitioner to be retried would be to give the Government a more favorable opportunity at a second trial to convict petitioner. It is clear that where, as in the present case, the trial has been progressing so favorably for the defendants that the trial court expressed its opinion that the jury would not convict, a mistrial cannot be for the effective protection of the defendant, *cf. Gori* v. *United States* 367 U. S. 364 (1961) but can only be of help to the prosecution whose case is going badly. A termination of a trial under these circumstances cannot be effective to deprive petitioner of the safeguard of the Fifth Amendment against a second prosecution. *Green* v. *United States*, 355 U. S. 184, 188 (1957). Nor can petitioner's motion for an acquittal be deemed to have waived his constitutional right against being "twice put in jeopardy." Petitioner did not ask for a mistrial and in fact would have vigorously opposed such "relief." Implying a fictional consent by petitioner to a mistrial not only runs contrary to the realities of the posture of the trial below but is also violative of the established principle that constitutional rights will not lightly be presumed to have been waived. *Glasser* v. *United States*, 315 U. S. 60, 70 (1942); *Green* v. *United States, supra* at pp. 191-197.

ARGUMENT

I.

It was improper for the court below to issue mandamus reviewing and vacating the judgment of acquittal directed by the trial court.

The jurisdiction of the circuit courts to issue writs of mandamus is wholly statutory and their power to issue the writ is derived from 28 U. S. C. §1651(a) (*infra*, Appendix A). This statute empowers the circuit courts to issue extraordinary writs, such as the writ of mandamus, only if "in aid of" their appellate jurisdiction, *Whitney* v. *Dick*, 202 U. S. 132, 136-137 (1906), and only if "agreeable to the usages and principles of law." *Roche* v. *Evaporated Milk Ass'n*, 319 U. S. 21, 25 (1943). We will show that the issuance of the writ in this case was not "in aid of" the appellate jurisdiction of the court below (*infra*, pp. 21-22). We shall further show that the issuance of the writ was not "agreeable to the usages and principles of law" because (1) the writ cannot be used to review an exercise of judicial discretion by a trial court in passing on a legal issue in a case properly before it, no matter how erroneous such exercise of discretion may be (*infra*, pp. 22-24); (2) the trial court's exercise of discretion in directing an acquittal was justified (*infra*, pp. 24-32); (3) the trial court, even if in error, did not exceed its power in directing an acquittal (*infra*, pp. 33-46); and (4) the writ of mandamus cannot be used to nullify both the clear statutory and common law policies prohibiting appellate review by the Government of a judgment of acquittal in a criminal case (*infra*, pp. 47-52). For these reasons the issuance of the writ by the court below was improper and violated both the fundamental principles as to the nature of this extraordinary writ

and the restriction prohibiting the use of the writ as a substitute for appellate review when such review is otherwise precluded.

A. The Issuance of the Writ of Mandamus Was Not "In Aid Of" the Circuit Court's Appellate Jurisdiction.

Section 1651 of the Judicial Code, from which circuit courts derive their power to issue writs of mandamus, authorizes circuit courts to issue the writ only if it will be "in aid of" their jurisdiction.

The court below relied on *Ex parte United States*, 287 U. S. 241 (1932) as direct authority for its holding that the issuance of mandamus in the present case would be "in aid" of its appellate jurisdiction. However, in that case there was potential appellate jurisdiction existing at the time this Court directed the district court judge to perform his non-discretionary duty to issue a bench warrant for the arrest of a person duly indicted. In the present case there was no federal appellate jurisdiction "in aid" of which mandamus could be issued by the court below. The Government has no right to appeal from any judgment made during the course of a criminal trial except in those instances specifically authorized by statute. *United States* v. *Borden Company*, 308 U. S. 188, 192 (1939); *United States* v. *Sanges*, 144 U. S. 310 (1892). The Criminal Appeals Act, 18 U. S. C. §3731 (*infra*, Appendix A) contains no authorization for an appeal by the Government from a judgment of acquittal. The judgment of acquittal directed by the trial court extinguished whatever actual or potential jurisdiction may have existed in the court below to review even those aspects of a criminal case which are specifically enumerated in the Criminal Appeals Act. The defendants, of course, would have no reason to appeal their acquittal and in any event the maximum statutory time for appeal

had expired when the Government applied for the writ on November 3, 1960 (R. 1), forty-two days after the judgment of acquittal had been entered (R. 37). Federal Rules of Criminal Procedure, Rule 37(a)(2) (*infra*, Appendix A). Immediately prior to the Government's application for the writ there was no way for this case to come before the court below and the writ of mandamus cannot be used as a bootstrap to confer jurisdiction which does not otherwise exist. *Bath Co.* v. *Amy*, 13 Wall. 244 (1872); *Delaware L. & W. R. Co.* v. *Rellstab*, 15 F. 2d 137 (3rd Cir. 1926); *cf. Federal Power Commission* v. *Metropolitan Edison Co.*, 304 U. S. 375 (1938).

B. The Issuance of Mandamus by the Court Below Violates the Basic Principle That Mandamus Will Not Lie to Review the Exercise of Judicial Discretion by an Inferior Court.

The writ of mandamus cannot serve as a substitute for an appeal; it does not lie to review or correct errors committed by an inferior court in the exercise of its discretion, nor to compel a particular decision. Where a trial court has jurisdiction of a cause and the parties, the function of the writ is rather to require the trial judge to exercise his discretion by adjudicating the merits of the case, if he refuses to do so. *Bankers Life & Casualty Co.* v. *Holland*, 346 U. S. 379, 381-83 (1953); *Morrison* v. *District Court*, 147 U. S. 14 (1893); *Ex parte Perry*, 102 U. S. 183 (1879); *Ex parte Loring*, 94 U. S. 418 (1877); *Ex parte Newman*, 14 Wall. 152, 165-166 (1872).

In *Ex parte Newman, supra*, at p. 169, this Court in refusing mandamus, said:

> "Superior tribunals may by *mandamus* command an inferior court to perform a legal duty where there is no other remedy, and the rule applies to judicial as well as to ministerial acts, but it does not apply at all to a judicial act to correct an error, as where the act

> has been erroneously performed. If the duty is unperformed, and it be judicial in its character, the mandate will be to the judge directing him to exercise his judicial discretion or judgment, without any direction as to the manner in which it shall be done. . . . "

In the present case it is clear that the trial court did not refuse to adjudicate an issue which it had a duty to decide. To the contrary, it was acting in a judicial capacity when it granted petitioner's motion for a directed judgment of acquittal. Any doubt there may be as to this is dispelled by the statement made by the trial court to the jury in passing upon defendants' motions for acquittal (R. 572-75).

Nor is this a case, as in *DeBeers Consolidated Mines* v. *United States*, 325 U. S. 212 (1945), where mandamus is proper because the trial court presumes to act while its jurisdiction over the person of the defendant is still in question,* or where, as in *United States Alkali Export Association* v. *United States*, 325 U. S. 196 (1945), the trial court may be the wrong tribunal in which the cause should be heard. Also readily distinguishable is *La Buy* v. *Howes Leather Co.*, 352 U. S. 249 (1957), where mandamus issued to prevent a trial judge from abdicating his judicial function by improperly referring a case before him to a master for decision. In *La Buy*, the mandamus performed the traditional function of requiring a judge to hear a case properly before him.

In sharp contrast with the foregoing decisions, the trial court in the present case concededly had jurisdiction of both the offense charged and the defendants, and rendered a decision on the merits of a terminal motion before it. On

* Moreover, in *DeBeers*, the trial court undertook to safeguard a non-existent Government right to money damages (the relief demanded being merely equitable) by a type of sequestration order which would normally have been immediately appealable but for its unprecedented form.

these facts, it is apparent that the mandamus issued only to correct an allegedly erroneous decision by the district court and thus performed the office of an appeal. By its terms, the writ vacated the judgment previously entered. Its effect was to compel a particular determination by the trial court of the motions for acquittal, that is, to deny them. This is not the function of the writ of mandamus. *Ex parte Newman, supra.*

No factual basis exists for any assertion that the trial court, in effect, granted only a "mistrial" and that the writ of mandamus merely issued to correct the form of the judgment entered. There was no motion before the trial court for a mistrial and the trial court had no intention of granting one. The posture of the trial, in view of the unfavorable impression created by the Government witnesses, was such that the defendants would in no event have requested nor agreed to a mistrial. This Court has repeatedly and consistently rejected previous efforts by the Government to have a fictitious label applied to a trial court's judgment in a criminal action for the purpose of obtaining review where no appellate right would otherwise exist. *Carroll* v. *United States,* 354 U. S. 394, 406 (1957); *United States* v. *Weissman,* 266 U. S. 377 (1924); *United States* v. *Oppenheimer,* 242 U. S. 85 (1916); *United States* v. *Carter,* 231 U. S. 492, 494 (1913).

C. The District Court's Direction of a Judgment of Acquittal Was Not Erroneous.

It is apparent from the decision of the circuit court that the consideration which led it to conclude that there had been no jurisdiction to direct an acquittal, was its reaction to what it regarded as improper conduct on the part of the trial judge. The court below was of the view that the trial judge had, by extensive questioning of the Government's witnesses, interfered to an unwarranted degree

in the trial, and had thereafter, completely without justification, criticized the prosecuting attorney for procuring, out-of-court, a change in the testimony of a Government witness.

We submit the record shows that the trial court's conduct throughout the trial was proper. Nor was the final action taken by the trial judge without justification.

Proof of the alleged criminal fraud and conspiracy charged by the Government, required, as a first prerequisite, intelligible explanations of technical matters such as how a radiosonde functioned and the nature of the testing procedures which were alleged to have been falsified. Obviously a verdict against the defendants could not be brought in or sustained unless a clear picture of the proper testing procedures had been given to the jury. The Government itself recognized this in its opening statement to the jury, saying (R. 70):

> "Before you can follow the testimony about the falsification of the tests you will have to know something about the instrument involved, how it was made and how it was to be tested . . ."

It was therefore entirely proper for the trial judge to undertake to clarify for himself and the jury this technical testimony as to the nature of the radiosonde and the procedures for testing it which the Government witnesses were presenting in an inarticulate and confusing manner (see *e.g.*, R. 146-47, 170-72, 359, 386-87).* See *Glasser* v. *United States*, 315 U. S. 60, 82 (1942); *United States* v. *DeFillo*, 257 F. 2d 835, 839-840 (2d Cir. 1958); *United States* v. *Amorosa*, 167 F. 2d 596, 600 (3rd Cir. 1948). In fact, such

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* Even the Government's documentary evidence, prepared by its witness Paliatto, with respect to the supposed organizational setup at petitioner's North Dighton plant (R. 96-97) was inaccurate and misleading (R. 482-483, 490, 507).

clarification was not only proper, but the duty of the trial court, particularly in view of the admission to the court made by Paliatto near the very beginning of his testimony, that he was inept at simple exposition comprehensible to laymen (R. 102). See *Ochoa* v. *United States*, 167 F. 2d 341, 344 (9th Cir. 1948); *United States* v. *Laurelli*, 187 F. Supp. 30, 34-35 (M. D. Pa. 1960).

Nor were the trial court's interjections during the course of the trial out of mere solicitude for the rights of the defendants. The trial judge aided the Government in phrasing questions in admissible form (*e.g.*, R. 87-90, 538), gave Government counsel considerable latitude in its questioning to enable the scientific aspects of the case to be brought out (*e.g.*, R. 142) and attempted to elicit by his questioning a correct and clear explanation of the complicated radiosonde tests (*e.g.*, R. 137-38, 191, 539). In fact the trial court, on several occasions, because of the incompetent presentation being made of the Government's case, offered the Government an opportunity to further rehearse the technical aspects of the case with Paliatto so that it would be comprehensible to the jury (R. 118, 148, 172).

The circuit court viewed the "cold" record as showing injudicious conduct on the part of the trial judge. But as was said by another circuit court in dealing with a similar complaint by a defendant as to a trial court's questioning and remarks in a criminal case:

> "It is impossible to gather from the cold record, particularly when it is in narrative form, the atmosphere of the trial itself, the manner in which the words were spoken, or the probable effect, if any, which they had upon the merits of the controversy." *Goldstein* v. *United States*, 63 F. 2d 609, 613 (8th Cir. 1933).

Moreover, even the "cold" record shows that the trial judge was extremely conscious of his judicial responsibility both to ensure that the proceedings were conducted in a manner in keeping with the gravity of a criminal trial (R. 166, 477-478, 573) and to provide a record intelligible to an appellate court (R. 98, 148, 178, 504). If the record makes it appear that the trial court was on occasion sharp in its comments, or seemed impatient, or expressed amusement at the peculiar use of language by a Government witness, this was not altogether without justification (see, *e.g.*, R. 191, 355-357, 549; compare R. 543-544 with R. 546-547; R. 135-136). Moreover, as Judge Learned Hand observed in *United States* v. *Warren*, 120 F. 2d 211, 212 (2d Cir. 1941) in rejecting a defendant's appeal which alleged that a fair trial had been prevented by the district court's constant comments and interruptions:

> " . . . We have examined the passages of which the accused complains, and, while at times the judge was somewhat curt in his rulings, it would be unwarranted to hold that his bearing towards the accused could have really prejudiced him with the jury. It would be idle to take up the details of a criticism which as a whole appears to us unfounded. Indeed, the disposition of courts to reverse judgments because of minor excesses in the exercise of the judge's authority at the trial has much abated; separate passages cut from their context and from the trial as a whole, often have an apparent importance which in fact they do not deserve. We do not of course mean that we may ever abdicate our essential duty of insuring an impartial conduct of the trial; that is quite as important as an understanding of the rights and liabilities involved—indeed, in the end even more so—but nothing conduces less to it than an over jealous scrutiny of every word that may fall from the judge's mouth."

The unreliability of the testimony of the Government witnesses Paliatto and Rosenholm is evident (see, *e.g.*,

R. 135-136, 191, 232-234, 255, 313, 357, 400-01; and compare R. 269 with R. 268, R. 353 with R. 358, R. 469 with R. 470, R. 459-460 with R. 461-462; R. 543-545 with R. 546-548 and R. 551-552 with R. 559). The full extent of the unfavorable impression made by them obviously cannot be gained merely from the record, which does not convey the demeanor of the witnesses nor the inflections, delays or other nuances of their oral testimony.* See *Brown* v. *Capital Transit Co.*, 127 F. 2d 329, 330 (D. C. Cir. 1942). The significance of this factor in the present case is indicated by Judge Wyzanski's statement introductory to his recommendation that the case be *nolle prossed* (R. 360):

> "The cold record perhaps inadequately conveys the total picture as it has developed in the last few days of testimony, and in particular the testimony of the witness Palliotto [sic], who is on the stand."

The testimony of the Government witnesses Paliatto and Rosenholm fully justified the district court's finding that they had "a lamentable lack of awareness or lack of capacity in connection with their testimonial obligations" (R. 573). The circuit court agreed that the testimony of the Government witnesses was "confused and conflicting" and "not entirely reliable" but stated that this was in no minor part due to the trial court's extensive questioning (286 F. 2d at 560, R. 50-51). But a trial judge is not a mere automaton at a criminal trial, and as previously shown (*supra*, at pp. 25-26) it was not only proper but the trial court's duty, under the circumstances, to actively question the witnesses. Moreover, it was not the trial court's questioning which, for example, caused the witness

* In the present case the "grudging testimony" and "hostility" of Paliatto towards the defendants conveyed by the tone and manner in which he spoke, is revealed by the record only because it manifested itself to such a degree that the trial court found it necessary to caution the witness (R. 335).

Rosenholm to change a whole line of testimony as to test cards supposedly improperly given to another co-conspirator (Compare R. 546-548 with R. 543-545) nor to shift the date of an alleged conversation in order to bring it within the period of the indictment (Compare R. 559 with R. 552). And it was not the trial judge's questioning which made Paliatto first testify that he had not destroyed allegedly falsified test tapes pertaining to the radiosonde units after the F.B.I. investigation was initiated (R. 352-353), but then finally admit that he had done so (R. 355, 358).* Nor was it the trial court which, in this criminal fraud case, induced Paliatto to confusingly misuse the term "spurious" when he meant "instantaneous" in referring to the radiosonde test signals (R. 135-136). In fact it was the trial court's interjection which clarified this (R. 135-136).

The trial court's action, taken on the eighth day of the trial after hearing testimony of three Government witnesses, was in no way precipitous. The presentation of the Government's case was, from the beginning, inept and confusing. At the close of the second day of testimony, immediately after the Government had given the jury "misleading exhibits" (R. 171), the trial court was moved to state (R. 172):

> "I am quite prepared to take drastic action in connection with this case. I think the best thing would be

* Paliatto handicapped the defense by destroying allegedly falsified test tapes after he made his complaint to the F.B.I. (R. 197-198, 358). Although the trial court did not expressly advance the destruction of the test tapes as a reason for granting the motion for acquittal, this ground should have been considered by the circuit court and may still be urged before this Court in support of the trial court's action. *United States* v. *Jones*, 174 F. 2d 746, 748 (7th Cir. 1949); *Smith* v. *United States*, 173 F. 2d 181, 184-85 (9th Cir. 1949). The destruction of the test tapes is closely analogous to the loss of documents, which was held to warrant a final dismissal of the case against the Government in *United States* v. *Heath*, 260 F. 2d 623 (9th Cir. 1958).

> to give you [Government counsel] a recess for the balance of the day, and on Monday come in at 10:00 o'clock, and if the case at that time, in connection with this technical matter, is not so prepared that I feel the jury is getting a fair picture I am not going to submit anybody to the risks of this kind of confusion in this very grave case in which the charge is that the defendants have confused the Government with false and misleading reports."

Moreover, before the trial judge directed the acquittal, he and the jury had been exposed to approximately seven days of testimony by two key Government witnesses, Paliatto and Rosenholm. Paliatto, in particular, was an indispensable Government witness. Early in the case the Government told the court that Paliatto was going to testify "both" as an "expert" on the technical explanatory matters and as a witness to the "particular occasion when the crime was committed" (R. 80; see also R. 365). He was the chief Government inspector at petitioner's plant with full responsibility for conducting and supervising the radiosonde tests which were allegedly falsified (R. 157, 253-54, 274); and it was his complaint to the F.B.I. which resulted in the indictment in this case (R. 353-354). After listening for five days to Paliatto's confused and contradictory testimony, the trial court was convinced that the unfavorable impression created was ineradicable, that Paliatto was completely discredited as a witness and that the jury would not return a conviction (R. 360-362, 364).

It was against this background, supplemented by the further testimonial unreliability shown by the Government witness Rosenholm, that the incident occurred on the eighth day of the trial while Rosenholm was on the stand, which triggered the determination by the trial judge that an acquittal was necessary in the interests of justice. Rosenholm was an alleged co-conspirator who had not been

indicted (R. 544). Essential to the Government's charge that there had been a conspiracy to conceal the alleged fraud was a conversation said to have taken place between Rosenholm and a representative of petitioner (R. 557).* Rosenholm initially placed this conversation as having taken place in February, 1958 (R. 552), which was subsequent to the period—September, 1956 to November, 1957—covered by the indictment (R. 6-23). The next morning, when he resumed the stand, Rosenholm changed the date of this alleged conversation to September, 1957 in order to bring it within the period of the indictment (R. 559). On cross-examination it was brought out that this change in Rosenholm's testimony was suggested by Government counsel to Rosenholm an hour or so before the trial had resumed that morning (R. 567-568). At this point, in the context of the Government's failure to present a fair and intelligible picture of the necessary first part of its case and the testimonial deficiencies of two key Government witnesses who were to be recalled in further support of the second part of the Government's case (R. 238, 365, 565), the trial court invited, considered and granted the defendants' motions for acquittal (R. 570, 572-575).

The court below cites *Frazer* v. *United States*, 233 F. 2d 1 (9th Cir. 1956) as authority for its view that the prosecuting attorney had done nothing improper. However, in the *Frazer* case, the prosecutor initiated the out-of-court discussion with his witness out of solicitude for the rights of the defendant rather than to advance his case. The prosecutor, in that case, made the witness correct her untrue

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* The prosecuting attorney's statement to the trial court makes this clear: "In regard to this, the Government's theory is that Teichman, an agent of the company, is apprised as to what is going on; that thereafter no steps were taken. The people involved are retained. Moreover, through other witnesses, that he affirmatively attempts to conceal what is going on."

statement that she was not receiving any compensation for her appearance on behalf of the Government. This is completely different from the present case. Here the Government induced its witness, during a recess, to change his testimony so as to lay a foundation for an otherwise inadmissible conversation essential to the Government's charge that petitioner had been apprised of the alleged fraudulent testing and had thereafter become party to a conspiracy to conceal it from the Government (R. 557, 565).

Another able district court judge recently had occasion to indicate that he would have reacted with no less indignation than did Judge Wyzanski to a showing that the Government had, off-the-witness stand, induced its witness, an alleged co-conspirator, to make a similar change in testimony. *United States* v. *Dillon*, 183 F. Supp. 541, 542 (S. D. N. Y. 1960).

A federal trial court is charged both with the responsibility of ensuring that criminal proceedings are conducted with solicitude for the essential rights of the accused, *Gori* v. *United States*, 367 U. S. 364 (1961); *Glasser* v. *United States*, 315 U. S. 60, 71 (1942), and with the efficient and expeditious administration of criminal justice *United States* v. *Maryland Cooperative Milk Producers, Inc.*, 145 F. Supp. 151, 152 (D. D. C. 1956). As Judge Wyzanski said (R. 575):

> "It is not the duty of a court to see that every guilty man is punished. It is the duty of a court to see that every man gets a fair trial. The highest public interest is not the punishment of the wicked, but the establishment and maintenance of justice under law."

In light of these principles, it was not erroneous for the trial court in the present case to have directed an acquittal

D. Even if the District Court Committed Error It Was Not Acting Beyond Its Jurisdiction in Directing a Judgment of Acquittal.

The court below was unanimous in holding that the trial court had no jurisdiction to direct an acquittal. However, the circuit court sharply differed in its reasons for reaching this conclusion. The majority opinion took the view that, prior to the completion of the Government's case, the trial court "had no power, that is to say, jurisdiction" to terminate the trial with finality against the Government, whether for alleged insufficiency of the evidence or for the alleged improper conduct of Government counsel (286 F. 2d at 560, 563, R. 50, 55). The majority apparently accepted—at least in part—the Government's contention that the judgment of acquittal was a "nullity" because, under the circumstances of the case, the Government was deprived of its right to a jury trial and because Rule 29(a) of the Federal Rules of Criminal Procedure abrogated the trial court's power to direct an acquittal.

Judge Aldrich disagreed with the majority's conclusion that the trial court had no power to direct an acquittal prior to the close of the Government's case based on alleged deficiencies in the evidence (286 F. 2d at 565-566, R. 59-62). However, he was of the opinion that the sole reason for the action taken was the court's belief that Government counsel had acted improperly in procuring a change in the testimony of Rosenholm during a recess (286 F. 2d at 568, R. 65). This reason, according to Judge Aldrich, afforded no jurisdictional basis for a direction of acquittal (286 F. 2d at 567, 568, R. 62-64).

We submit that Judge Aldrich was mistaken in his view that the improper conduct of Government counsel was the sole reason for the trial court terminating this criminal case. (See discussion, *supra*, pp. 27-31.) Undoubtedly,

it was Government counsel's conduct that was the "last straw", particularly since it involved a further demonstration of the unreliability of the testimonial capacity of Rosenholm. However, it is also clear that Judge Wyzanski was moved in large measure by what he viewed as the incurable deficiencies in the Government's presentation (R. 573, 575), which earlier in the case had prompted him to consider taking "drastic action in connection with this case" (R. 172) and, subsequently, to recommend to the Government that it *nolle prosse* the case because he believed that the jury would not convict, and if it did, that he would have to set aside such a conviction (R. 359, 362). But in any event, even if Judge Aldrich is correct in stating that the trial court's action was motivated solely by the conduct of Government counsel, it does not follow that there was no jurisdiction to acquit for this reason.

We will show that (1) the decision of the circuit court conflicts with the established principle that a district court in a criminal case has inherent power to conclusively terminate the trial against the Government at any time it believes, even if erroneously, that the interests of justice so require; (2) that the Government was not deprived of a right to a jury trial in the present case; and (3) that Rule 29(a) of the Federal Rules of Criminal Procedure has no impact on the power of a trial court to direct an acquittal prior to the close of the Government's case.

(1) *A District Court Has the Inherent Power to Direct a Judgment of Acquittal at Any Stage of a Criminal Trial.*

The court below improperly magnified into jurisdictional proportions the errors which it believed the trial court committed. The opinion of the circuit court intimates that in applicable situations a trial court has the power to direct an acquittal prior to the close of the Government's

case (262 F. 2d at 562, R. 54-55). The court below nevertheless held that in the circumstances of the present case this power did not exist. However, existence of the power to decide a legal issue cannot turn upon whether a particular case or set of circumstances warrants its exercise. The power to decide means the power to decide wrongly, no matter how serious and fundamental the error may be to the rights of a party. In *Lamar* v. *United States*, 240 U. S. 60, 64-65 (1916), this Court said:

> "Jurisdiction is a matter of power, and covers wrong as well as right decisions. . . . And nothing can be clearer than that the district court, which has jurisdiction of all crimes cognizable under the authority of the United States . . . acts equally within its jurisdiction whether it decides a man to be guilty or innocent under the criminal law, and whether its decision is right or wrong."

Similarly, in *Bankers Life & Casualty Co.* v. *Holland*, 346 U. S. 379, 382 (1953), in holding that the issuance of mandamus was improper, this Court said:

> "The contention is that in acting on the motion and ordering transfer, he [the district court judge] exceeded his legal powers and this error ousted him of jurisdiction. But jurisdiction need not run the gauntlet of reversible errors."

Both authority and reason support the conclusion that a district court, having cognizance of the offense charged and the defendants, does have the inherent power to direct a judgment of acquittal at any stage of the trial. Directly in point is this Court's decision in *United States* v. *Weissman*, 266 U. S. 377 (1924), where Mr. Justice Holmes, speaking for a unanimous court said (at pp. 378-79):

> "It is argued that the verdict is a nullity because nothing had been submitted to the jury,—no evidence,

> not even an opening statement; and that the judgment should be treated as in substance sustaining a demurrer to the indictment or quashing it . . . .
> . . . [I]f directing the verdict was wrong, it certainly was not beyond the jurisdiction of the court. The jury were there and the prisoners before them; and, so far as jurisdiction is concerned, it did not matter whether evidence had been put in or not. We stop at the point of jurisdiction, the want of which would be the only pretext that could be offered for going behind the literal meaning of the [Criminal Appeals Act]. But we do not mean to imply that an opening by counsel or the offer of evidence is necessary in order to justify directing a verdict of not guilty; there are other cases in which it is done."

Although, in the *Weissman* case, the Government attempted to obtain review by a writ of error rather than mandamus, the Court's reasoning is equally applicable to the present case on the issue of whether an allegedly precipitous and arbitrary direction of acquittal may be considered as a jurisdictional defect and the acquittal therefore treated as a "nullity".

In the relatively few other cases where any question has been raised before a federal court concerning the power of a trial court in a criminal case to direct a judgment of acquittal, this power has been uniformly presumed. *Kepner* v. *United States*, 195 U. S. 100, 129 (1904); *United States* v. *Sanges*, 144 U. S. 310 (1892); *United States* v. *Heath*, 260 F. 2d 623, 626 (9th Cir. 1958); *Umbriaco* v. *United States*, 258 F. 2d 625, 626 (9th Cir. 1958); *District of Columbia* v. *Burns*, 32 App. D. C. 203, 204-05 (D. C. Cir. 1908); *United States* v. *Maryland Cooperative Milk Producers, Inc.*, 145 F. Supp. 151, 152 (D. D. C. 1956). In the landmark case of *United States* v. *Sanges*, *supra*, this Court gave its approval to the following language (144 U. S. at 315):

> "The rule seems to be well settled in England, that in criminal cases a new trial is not grantable to the Crown after verdict of acquittal, even though the acquittal is founded on the misdirection of the judge. This is the general rule, and obtains in the states of our Union. It excludes a rehearing after acquittal upon errors of law, and therefore, it would seem, denies also a rehearing upon judgments of the court upon questions of law, even when the jury have not passed upon the guilt or innocence of the prisoner."

Judge Aldrich in the court below similarly recognized that "[i]n the absence of any contrary authority, it seems inherently reasonable to conclude that at whatever stage a fatal deficiency in the government's evidence irrevocably appears, the court is empowered to acquit" (286 F. 2d at 566, R. 60).

The courts of the several states which have considered the question of the power of a trial court in a criminal case to direct an acquittal, even arbitrarily, have also uniformly upheld its existence. See *e.g.*, *Commonwealth* v. *Adkins*, 171 Ky. 299, 188 S. W. 401 (1916); *State* v. *Thomson*, 76 N. D. 125, 34 N. W. 2d 80 (1948); *State* v. *Kelsey*, 49 N. D. 148, 190, N. W. 817 (1922); *People* v. *Goldfarb*, 152 App. Div. 870, 138 N. Y. Supp. 62 (1st Dept. 1912), *aff'd* 213 N. Y. 664 (1914); *Belter* v. *State*, 178 Wisc. 57, 189 N. W. 270 (1922).

Relevant to the present case is the well reasoned opinion by the Supreme Court of North Dakota in *State* v. *Thomson*, *supra*, in which the court said (at 34 N. W. 2d p. 96):

> "When a criminal action is tried to a jury it is the duty of the trial court to decide all questions of law which may arise in the course of the trial and to instruct the jury as to the law of the case, and it is for the jury to determine all questions of fact . . . . And where in such case there is competent evidence reason-

> ably tending to show that the accused is guilty of the offense charged, it is the duty of the court to submit all questions of fact to the jury for determination and the court is not authorized to advise or instruct the jury to return a verdict of acquittal. Yet, if the trial court in such case misconstrues a statute, applies the wrong rule of law, or places an erroneous construction on the evidence and as a consequence erroneously advises or instructs the jury to return a verdict of not guilty, such erroneous and unauthorized action on the part of the trial court does not constitute an act without or in excess of jurisdiction and does not render the verdict a nullity but the verdict operates as an acquittal of the defendant even though the result is that a defendant clearly guilty will go without any punishment whatsoever."

It is clear that a trial court has power to direct an acquittal even on the opening statement of the Government. See *Best* v. *District of Columbia*, 291 U. S. 411, 415 (1934); *Oscanyan* v. *Winchester Repeating Arms Co.*, 13 Otto 261, 263 (1881); *McGuire* v. *United States*, 152 F. 2d 577, 580 (8th Cir. 1945); *United States* v. *Maryland Cooperative Milk Producers, Inc.*, 145 F. Supp. 151, 152 (D. D. C. 1956). When an opening statement is augmented by the introduction of evidence there is even more reason to sustain the existence of the trial court's power to summarily terminate the proceedings. Moreover, a trial court has the power in a criminal case to terminate the case with finality against the Government even prior to the impaneling of a jury, *Carroll* v. *United States*, 354 U. S. 394 (1957); *United States* v. *Heath*, 260 F. 2d 623 (9th Cir. 1958), and to direct an acquittal despite a conviction returned by a jury. *Ex parte United States*, 101 F. 2d 870 (7th Cir.), *aff'd sub nom. United States* v. *Stone*, 308 U. S. 519 (1939); *Umbriaco* v. *United States*, 258 F. 2d 625, 626 (9th Cir. 1958). It is unreasonable and illogical to hold that the trial court's

power to terminate a criminal proceeding with finality against the Government prior to or at the outset of the trial, after the close of the Government's case and even after a jury verdict of conviction, vanishes in the interim period between the Government's first witness and its last witness.

This inherent power of a trial court to direct an acquittal must encompass the power to acquit for any reason whatsoever and certainly for any reason related to the conduct of the trial before it. Judge Aldrich, in the court below, concedes that a trial court has the power to decide, however erroneously, that the conduct of the case by the Government is improper, but contends that there is no power to acquit for this reason (286 F. 2d at 567, R. 62). There is no authority for such a restrictive view of a trial court's power, and it is inconsistent with the fundamental principle that a trial court has the inherent power to take whatever action in respect of a cause before it is, in its opinion, necessary to further the interests of justice. *United States* v. *Weissman*, 266 U. S. 377, 379 (1924). See also *Oscanyan* v. *Winchester Repeating Arms Co.*, 103 U. S. 261, 263 (1881); *United States* v. *Apex Distributing Company*, 270 F. 2d 747, 755-756 (9th Cir. 1959); *United States* v. *Heath*, 260 F. 2d 623, 625-626, 632 (9th Cir. 1958); *cf. Gori* v. *United States*, 367 U. S. 364 (1961).

No statute or rule expressly prohibits a federal trial judge, in a criminal case, from directing an acquittal because of the improper conduct of Government counsel.* Nor are a district court's powers limited in respect of a criminal case properly before it to those expressly set forth in the

* This alone makes completely inapposite the reliance placed by the circuit court on *Ex parte United States*, 242 U. S. 27 (1916) where mandamus was held to lie to require a district court judge to perform a non-discretionary duty of imposing a sentence after conviction which he had refused to do in violation of a "plain legislative command" (242 U. S. at 42).

governing procedural rules. *United States* v. *Heath*, *supra*, at p. 632; *Johnston* v. *Marsh*, 227 F. 2d 528, 531 (3rd Cir. 1955).

The circuit court's conclusion as to the non-existence of a power to acquit because of improper conduct by Government counsel, laid heavy emphasis upon the trial court's reference to an "elementary rule" which the trial judge believed the Government counsel had violated by inducing Rosenholm, off the witness stand, to change his previous testimony on a vital point (286 F. 2d at 562, 568, R. 53, 64-65). According to the court below, no such "rule" exists (286 F. 2d at 562, 567, 568, R. 53, 63-65). We believe that the trial court was referring to the rule of exemplary fairness to which this Court, in other situations, has said the Government must conform in its preparation and prosecution of a criminal case. In *Berger* v. *United States*, 295 U. S. 78, 88 (1935) this Court stated:

> "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones."

If the trial court improperly applied this rule to the particulars of Government counsel's conduct in the present case, it is no different than any other situation where a trial court, in a criminal case, misapplies a rule of law or statute to the case before it. Such misapplication could not oust

the trial court of jurisdiction. *United States* v. *Weissman*, 266 U. S. 377 (1924); *In re Eckart*, 166 U. S. 481, 483 (1897); *District of Columbia* v. *Burns*, 32 App. D. C. 203, 204-205 (D. C. Cir. 1908).

This Court's recent decision in the case of *Gori* v. *United States*, 367 U. S. 364, 370 (1961) was premised on the desirability of leaving trial judges free to "exercise their most sensitive judgment—according to their own lights in the immediate exigencies of trial—for the more effective protection of the criminal accused." If, as Judge Aldrich concedes, a trial court has the power to take some action in respect of alleged misconduct by Government counsel, then it must have the power to decide on the form of the action, *i.e.*, whether under "the immediate exigencies of trial" in a particular case, "the effective protection of a criminal accused" would be better served by an acquittal rather than a mistrial.

It may be contended that a trial court's power to acquit in a criminal case should be limited since situations may be conjured up in which justice might be thwarted by its exercise; *e.g.*, for a wicked purpose or out of a whim completely unrelated to the trial.* However, basing the determination of whether a direction of acquittal (or for that matter whether any other ruling by a trial court during a criminal trial) is a "nullity" upon an inquiry into the particular motives for a trial court's action will not protect against a hypothetical wicked or capricious judge. The real reasons for any such action can be readily hidden behind silence or a pretended rationale, or the action deferred to a stage in the proceeding at which it would concededly become non-reviewable. The most effective protec-

* There is no such suggestion advanced in the present case.

tion against these imaginary evils, consistent with our system of criminal justice, is the high standard of our federal judiciary, and in the abnormal case, the remedy of impeachment.* On the other hand, it is the circuit court's broad equating of error with lack of jurisdiction which poses a real danger to our criminal law administration by its encouragement to collateral attack, unlimited in time or place, on an unpredictable number of judicial rulings made during a criminal trial and on an unpredictable number of past and future judgments until now regarded as final.

(2) *The Government Was Not Deprived of a Jury Trial in the Present Case.*

The court below apparently accepted, at least in part, the Government's argument that the action of the trial court in terminating the case at an allegedly premature stage defeated the Government's "fundamental" right to a trial by jury.** It is not clear that the Government has such a right, but assuming, *arguendo*, its existence, such a right means a trial before a judge and a jury with the judge left free to decide all issues of law, including the sufficiency of a motion for acquittal. *Ex parte United States*, 101 F. 2d 870, 874-877 (7th Cir. 1939), *aff'd sub nom. United States* v. *Stone*, 308 U. S. 519 (1939). See *Sunal* v. *Large*, 332 U. S. 174, 182 (1947). It is perhaps worthy of note that the Government is now advancing the same proposition which it so vigorously opposed before this Court in *Roche*

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* We will also show (*infra*, pp. 47-52) that the "risk of judicial arbitrariness" during a criminal trial is imposed on the Government. *Cf. Gori* v. *United States*, 367 U. S. 364, 373 (1961) (dissenting opinion).

** Gov't Br. below, pp. 30-33.

v. *Evaporated Milk Association*, 319 U. S. 21 (1943), where it successfully contended:*

> "The right to trial by jury means a trial before a judge and jury as contrasted to a trial before a judge alone. For in jury trials, the judge and jury together, rather than the jury alone, constitute the tribunal. Herron v. Southern Pac. Co., 283 U. S. 91, 95. It is the function of the court to determine matters of law even when a jury is sitting. . . . If the court holds, on demurrer or other appropriate motion, that no cause of action is stated, the case never goes to the jury. This does not mean that the proceeding has not been heard before the proper tribunal, for the court had jurisdiction to pass upon the legal issues. And even if the judge's ruling, which prevented the issue from reaching the jury side of the tribunal, may have been erroneous, the losing party has not been deprived of its right to trial in the appropriate forum.
>
> "Accordingly, no extraordinary remedy, such as mandamus, is available to him. If this were not so, every decision sustaining a demurrer or directing a verdict in an action at law could similarly be treated as a denial of a trial by jury, subject to correction by mandamus if the appellate court thought it erroneous. . . ."

In support of its conclusion that the judgment of acquittal was a nullity because the Government had been prevented from presenting all its evidence, the majority in the court below relied on *Ex parte United States*, 287 U. S. 241 (1932). However, a judge's refusal to perform the ministerial and statutorily required duty of issuing an arrest warrant after an indictment has been properly returned, which prevents a case from being brought before a court for trial in the first instance, is hardly analogous

* Record on Appeal to the United States Supreme Court, Government Brief pp. 15-16.

to an alleged erroneous determination on an issue of law by a trial judge, which terminates a criminal trial properly before him on the eighth day of actual trial.

(3) *Rule 29(a) of the Federal Rules of Criminal Procedure Does Not Affect a Trial Court's Power to Direct an Acquittal at Any Stage of the Proceeding.*

The majority opinion of the court below suggests that the power of a trial court to acquit after the close of the Government's case does not exist prior to such time because of the second sentence of Rule 29(a) of the Federal Rules of Criminal Procedure, which reads:

> "The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses."

This suggestion in the majority opinion of the court below finds no support in the general canons of construction applied to statutes or rules pertaining to the judiciary. Nor does the purpose for the adoption of the second sentence of Rule 29(a) stated in the Notes of the Advisory Committee appended to this Rule, or the interpretation given by the courts to other analogous procedural rules, lend any support to such a contention.

The general principle applied in construing rules or statutes regulating judicial proceedings, even where they are phrased in restrictive terms, is to avoid reading jurisdictional significance into them. *Burnet* v. *Alvarez*, 226 U. S. 145, 147 (1912); *Fauntleroy* v. *Lum*, 210 U. S. 230, 234-35 (1908). Rule 29(a) does not expressly prohibit a district court judge from directing an acquittal at any stage of the

proceeding. The only mandatory language found in the Rule states that the court "shall order" an acquittal if the evidence at the close of the Government's case is insufficient to sustain a conviction. Were Rule 29(a) considered as mandatory and jurisdictional, then, if a trial court at the close of the Government's case erroneously refused to direct an acquittal when the evidence was inadequate to sustain a conviction, following the Government's theory, this would oust the trial court of jurisdiction and make a nullity of the further proceedings. But this is obviously not the consequence of such an improper refusal by the trial court to order an acquittal. See *Bryan* v. *United States*, 338 U. S. 552, 559 (1950); *Greenberg* v. *United States*, 280 F. 2d 472, 477 (1st Cir. 1960); *cf. Berkowitz* v. *United States*, 90 F. 2d 881, 884 (8th Cir. 1937) (violation of rule requiring sentencing without delay does not void the sentence).

The Notes of the Advisory Committee appended to Rule 29(a) do not indicate that the second sentence of this Rule was intended to in any way modify the previous practice, and it has been said that the rule merely reenacts "what had been the law before." *United States* v. *Outer Harbor Dock & Wharf Co.*, 124 F. Supp. 337, 339 (S. D. Calif. 1954). The only purpose stated for incorporating this language in the Rule was to follow the wording of Section 410 of the New York Code of Criminal Procedure. Prior to the adoption of the Federal Rules of Criminal Procedure in 1946, the New York courts apparently had not considered this language to make a "nullity" of an acquittal directed by a trial court prior to the close of the prosecution's case. *People* v. *Goldfarb*, 152 App. Div. 870, 138 N. Y. Supp. 62 (1st Dept. 1912), *aff'd* 213 N. Y. 664 (1914); *People* v. *Merrill*, 156 Misc. 637, 282 N. Y. Supp. 809 (1935).

Moreover, the federal courts have consistently taken the position that rules of criminal procedure do not affect the

jurisdiction otherwise possessed by a court.* *United States* v. *Maryland Cooperative Milk Producers, Inc.*, 145 F. Supp. 151, 152 (D. D. C. 1956) (Rule 29); *Ex parte United States*, 101 F. 2d 870, 876-878 (7th Cir. 1939), *aff'd sub nom. United States* v. *Stone*, 308 U. S. 519 (1939); *United States* v. *Heath*, 260 F. 2d 623, 632 (9th Cir. 1958); *United States* v. *Apex Distributing Company*, 270 F. 2d 747, 754 n. 17, 755, 756 (9th Cir. 1959); *Johnston* v. *Marsh*, 227 F. 2d 528, 531 (3rd Cir. 1955); *Berkowitz* v. *United States*, 90 F. 2d 881, 884 (8th Cir. 1937); *cf. In re Johnson*, 72 S. Ct. 1028, 96 L. Ed. 1377 (1952) (opinion in chambers by Mr. Justice Douglas). These decisions make it clear that a district court has broad discretionary powers, which exist outside the framework of procedural rules, to act in respect of a case properly before it, and that the rules, in no event, import jurisdictional limitations.

In *Bryan* v. *United States*, 338 U. S. 552 (1950), this Court, in considering Rule 29 of the Federal Rules of Criminal Procedure, said (at p. 559):

> "Of course the Court of Appeals must determine whether the Rule has been observed by the District Court. If it finds that the District Court has erred and has not properly applied the Rule, that is an error of law for which the Court of Appeals may reverse and remand."

In so characterizing a district court's failure to follow Rule 29 merely as an "error of law," this Court appears to have implicitly recognized that jurisdictional significance does not attach to such failure.

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* Rules pertaining to the procedure to be followed by the courts in civil cases have been similarly construed as not going to the court's jurisdiction. *E.g.*, *Ex parte First National Bank*, 228 U. S. 516, 518 (1913); *Matter of Hawkins*, 147 U. S. 486 (1893); *Ex parte Whitney*, 13 Pet. 404 (1839) (holding mandamus to be inappropriate merely to correct violations of procedural rules).

E. Mandamus Does Not Lie Where Both Statutory and Common Law Policy Prohibit Appellate Review.

The issuance of the writ by the court below directly conflicts with the congressional policy of non-reviewability of a judgment of acquittal as well as the historic common law prohibition against appellate review of criminal cases at the instance of the Government. This Court has in other analogous situations held inappropriate the issuance of extraordinary writs, such as mandamus, where they have been sought to circumvent a congressionally established policy against appellate review even though the statutory prohibition against review by way of appeal did not in terms refer to mandamus. *Ex parte Pennsylvania Company*, 137 U. S. 451 (1890) (remand statute); *In re Park & Tilford*, 245 U. S. 82, 86 (1917) (finality of decisions of the Court of Customs Appeals); *Interstate Commerce Commission* v. *United States*, 289 U. S. 385, 394 (1933) (finality of I. C. C. decisions); *United States* v. *Rice*, 327 U. S. 742 (1946) (remand statute). In the *Pennsylvania Company* case, *supra*, this Court, in addressing itself to a statute which provided that no appeals could be taken from orders remanding proceedings to a state court, said (at p. 454):

> "In terms, it only abolishes appeals and writs of error, it is true, and does not mention writs of mandamus: and it is unquestionably a general rule, that the abrogation of one remedy does not affect another. But in this case, we think it was the intention of Congress to make the judgment of the Circuit Court remanding a cause to the state court final and conclusive. The general object of the act is to contract the jurisdiction of the federal courts. The abrogation of the writ of error and appeal would have had little effect in putting an end to the question of removal, if the writ of mandamus could still have been sued out in this court. It is true that the general supervisory power of this court over inferior jurisdictions is of great moment in a public

> point of view, and should not, upon light grounds, be deemed to be taken away in any case. Still, although the writ of mandamus is not mentioned in the section, yet the use of the words 'such remand shall be immediately carried into execution', in addition to the prohibition of appeal and writ of error, is strongly indicative of an intent to suppress further prolongation of the controversy by whatever process. We are, therefore, of opinion that the act has the effect of taking away the remedy by mandamus as well as that of appeal and writ of error."

The applicability of this principle to federal criminal appellate jurisdiction was early illustrated in *Ex parte Gordon*, 1 Black. 503 (1862). In *Ex parte Gordon*, this Court, at a time when it had no general criminal appellate jurisdiction, refused a prerogative writ sought by a defendant under sentence of death on the ground that the ordinary process of appellate review had not been made available by Congress.

Few precepts are more firmly established in federal jurisprudence than the limited and strictly statutory nature of the Government's right to appellate review in a criminal case. For example, Section 6 of Chapter 517 of the Judiciary Act of March 3, 1891, 26 Stat. 828, which conferred appellate jurisdiction in criminal cases on the circuit courts of appeal created by that Act, did not expressly preclude the Government from a right of appeal. Nevertheless, in *United States* v. *Sanges*, 144 U. S. 310, 323 (1892) this Court said:

> "The provisions of section 6, giving the Circuit Courts of Appeals in general terms appellate jurisdiction of criminal cases, says nothing as to the party by whom the writ of error may be brought, and cannot therefore be presumed to have been intended to confer upon the government the right to bring it.

> "In none of the provisions of this act, defining the appellate jurisdiction, either of this court, or of the Circuit Court of Appeals, is there any indication of an intention to confer upon the United States the right to bring up a criminal case of any grade after judgment below in favor of the defendant. It is impossible to presume an intention on the part of Congress to make so serious and far-reaching an innovation in the criminal jurisprudence of the United States."

It was not until 1907 that Congress saw fit to give the Government any right whatsoever to obtain appellate review in a criminal case. The limited appellate rights in criminal cases which the Government now has by virtue of the present Criminal Appeals Act were initially conferred upon the Government in substantially the same form by the Criminal Appeals Act of 1907.*

This Court has so frequently and forcefully enunciated the restricted nature of the Government's appellate criminal rights and so often and carefully traced the legislative and historical bases for these limitations, that no extensive inquiry into the congressional purpose underlying the Criminal Appeals Act is required by way of demonstrating the congressional intent to narrowly confine criminal appeals by the Government. See *e.g.*, *Carroll* v. *United States*, 354 U. S. 394 (1957); *United States* v. *Borden Company*, 308 U. S. 188 (1939); *United States* v *Dickinson*, 213 U. S. 92 (1909); *United States* v. *Mersky*, 361 U. S. 431, 444-53 (1960) (dissenting opinion of Mr. Justice Frankfurter).

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* The subsequent amendments to the Criminal Appeals Act in 1942 (56 Stat. 271), in 1948 (62 Stat. 844), and in 1949 (63 Stat. 97), have been essentially formal changes, see *United States* v. *Mersky*, 361 U. S. 431, 445, n. 1 (1960), and are in no way indicative of any Congressional intent to broaden the Government's appellate rights in criminal cases beyond those specifically enumerated in the Act.

In *Carroll* v. *United States*, *supra*, this Court said (at pp. 400-02):

> ". . . [I]n the federal jurisprudence, at least, appeals by the Government in criminal cases are something unusual, exceptional, not favored. The history shows resistance of the Court to the opening of an appellate route for the Government until it was plainly provided by the Congress, and after a close restriction of its uses to those authorized by the statute . . . When the Congress responded to the problems of such cases [prosecutions dismissed because of interpretation or invalidation of a statute], in the Criminal Appeals Act of 1907, now 18 U. S. C. §3731, it did so with careful expression of the limited types of orders in criminal cases as to which the Government might thenceforth have review."

A fair reading of the import of the legislative history of the Act, as noted in the above cited decisions of this Court, indicates a complete absence of any congressional intention to give the Government a right to have a verdict of acquittal vacated or to permit a defendant, once acquitted under any circumstances, to be tried again. See *e.g.*, H. R. REP., No. 2119, 59th Cong., 1st Sess. 1, 3 (1906); 41 CONG. REC. 2748 (1907) ("But when a man has been once tried and acquitted that ought to be the end of it, jeopardy or not". Statement of Senator Rayner); 41 CONG. REC. 2752 (1907) (remarks of Senator Knox, a principal spokesman for the Act); 41 CONG. REC. 3046 (1907) (remarks of Rep. Jenkins); see also Kurland, *The Mersky Case and the Criminal Appeals Act*, 28 U. CHIC. L. REV. 419, 446-455 (1961). Moreover, there can be little dispute that the legislative aim was to leave "a few extra weights" on the defendant's side of the scales of justice. *United States* v. *Koenig*, 290 F. 2d 166, 167 (5th Cir. 1961).

Furthermore, Congress has in no way indicated any intent to limit the full sweep of the decision in *United States*

v. *Weissman*, 266 U. S. 377 (1924) where this Court held that the Criminal Appeals Act bars appellate review of a judgment of acquittal, irrespective of whether it was erroneous, and that the appellate court's inquiry can go no further than to ascertain whether, in the first instance, the trial court had jurisdiction over the offense charged and the defendant. In *Weissman*, this Court, in rejecting the Government's argument that an erroneously and prematurely directed acquittal was a nullity and therefore could be reviewed and vacated, said (at pp. 378-379):

> "But we are of opinion that no such narrowing construction can be put upon the Criminal Appeals Act for the purpose of enlarging the government's right of review. The words, taken literally, refer simply to the matter of fact that there 'has been a verdict,'—not qualified by any consideration of whether it was right or wrong. . . . Furthermore, if directing the verdict was wrong, it certainly was not beyond the jurisdiction of the court. The jury were there and the prisoners before them; and, so far as jurisdiction is concerned, it did not matter whether evidence had been put in or not. We stop at the point of jurisdiction, the want of which would be the only pretext that could be offered for going behind the literal meaning of the statute."

The considerations which have led this Court in other situations to hold that Congress, in not providing for, or in taking away, the right of appeal has also precluded the extraordinary remedy of mandamus, are far more compellingly present in this case where the broader scope of the limitation on appellate review is rooted in the constitutional command that no person shall be "twice put in jeopardy." In the context of this constitutional prohibition, the clear congressional hostility to appellate review of an acquittal and the common law restrictions on the Government's criminal appellate rights, the Criminal Appeals Act

should be held to bar the circuit court from reviewing and vacating by mandamus the judgment of acquittal in the district court below.

II.

The issuance of mandamus by the court below vacating the judgment of acquittal and ordering a new trial places petitioner twice in jeopardy in violation of the Fifth Amendment.

A. The Judgment of Acquittal Directed by the District Court, Irrespective of How Improper It May Have Been, Constitutionally Bars a Retrial of Petitioner.

The writ of mandamus issued by the court below vacating the judgment of acquittal and ordering petitioner to be retried for the same offense places petitioner twice in jeopardy in violation of the Fifth Amendment.*

Historically, the primary content of double jeopardy, as incorporated in the Fifth Amendment, was the common law plea of *autrefois acquit* or *convict*, a plea which lay where there had been a verdict of innocence or guilt. The plea of *autrefois acquit*, or a former acquittal, states Blackstone in 4 Blackstone's Commentaries 335:

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* Petitioner corporation is a "person" entitled to the Constitutional safeguard under the Fifth Amendment against being "twice put in jeopardy." *United States* v. *Glidden Co.*, 78 F. 2d 639 (6th Cir. 1935); *United States* v. *United States Industrial Alcohol Co.*, 15 F. Supp. 784 (D. C. Md. 1936), *rev'd* on other grounds, 103 F. 2d 97 (4th Cir. 1939). See also *United States* v. *M'Hie*, 194 Fed. 894, 898 (N. D. Ill. 1912). This is the only reasonable construction of the double jeopardy provision of the Fifth Amendment since its rationale "that the State with all its resources and power should not be allowed to make repeated attempts to convict", *Green* v. *United States*, 355 U. S. 184, 187 (1957), or to impose successive punitive sanctions, is as applicable to a corporation as to an individual.

> "is grounded on this universal maxim of the common law of England, that no man is to be brought into jeopardy of his life, more than once, for the same offence. And hence it is allowed as a consequence that when a man is once fairly found not guilty upon any indictment or other prosecution, before any court having competent jurisdiction of the offence, he may plead such acquittal in bar of any subsequent accusation for the same crime."

This Court early declared that the double jeopardy provision contained in the Fifth Amendment, being founded upon the common law pleas of *autrefois acquit* or a former acquittal and *autrefois convict* or a former conviction, barred a second prosecution for the same offense. In *Ex parte Lange*, 18 Wall. 163, 169 (1874), this Court said:

> "The common law not only prohibited a second punishment for the same offence, but it went further and forbid a second trial for the same offence, whether the accused had suffered punishment or not, and whether in the former trial he had been acquitted or convicted.
>
> "Hence to every indictment or information charging a party with a known and defined crime or misdemeanor, whether at the common law or by statute, a plea of *autrefois acquit* or *autrefois convict* is a good defence."

After reviewing the English and American state authorities, this Court in *Ball* v. *United States*, 163 U. S. 662, 671 (1896), said:

> "As to the defendant who had been acquitted by the verdict duly returned and received, the court could take no other action than to order his discharge. The verdict of acquittal was final, and could not be reviewed, on error or otherwise, without putting him twice in jeopardy, and thereby violating the Constitution. However it may be in England, in this country

> a verdict of acquittal, although not followed by any judgment, is a bar to a subsequent prosecution for the same offence."

In *Kepner* v. *United States*, 195 U. S. 100 (1904), this Court, finding that Congress made applicable to the Philippine Islands a double jeopardy provision similar in wording and exact in meaning to the Fifth Amendment, held that a defendant was placed twice in jeopardy if an appellate court reviewed and reversed a trial court's verdict of acquittal for the defendant. More recently, this Court reaffirmed, in *Green* v. *United States*, 355 U. S. 184 (1957), that the Fifth Amendment prohibits review in an appellate court or a retrial after a verdict of acquittal.

Under this long line of decisions by this Court, an acquittal, whether infected with error or free of error, stands as a constitutional bar to appellate review or retrial of a defendant. As was stated by this Court in *Green* v. *United States, supra* at p. 188:

> "Thus it is one of the elemental principles of our criminal law that the Government cannot secure a new trial by means of an appeal even though an acquittal may appear to be erroneous. United States v. Ball (U. S.) supra; Peters v. Hobby, 349 U. S. 331, 344, 345, 99 L. ed. 1129, 1140, 75 S. Ct. 790. Cf. Kepner v. United States, 195 U. S. 100, 49 L. ed. 114, 24 S. Ct. 797, 1 Ann. Cas. 655; United States v. Sanges, 144 U. S. 310, 36 L. ed. 445, 12 S. Ct. 609."

Similarly the courts in those states which have adopted the prohibition against double jeopardy either through a constitutional provision or on common law grounds, have uniformly held that a direction of a verdict of acquittal no matter how irregular or erroneous, is a bar to a second trial. See, *e.g.*, *State* v. *Taylor*, 180 Ark. 588, 22 S. W. 2d 34 (1929); *People* v. *Webb*, 38 Cal. 467 (1869); *People* v.

Terrill, 132 Cal. 497, 64 P. 894 (1901); *State* v. *Kelley*, 193 Iowa 62, 186 N. W. 834 (1922); *Commonwealth* v. *Ramey*, 279 Ky. 810, 132 S. W. 2d 342 (1939); *Commonwealth* v. *Ball*, 126 Ky. 542, 104 S. W. 325 (1907); *State* v. *Council West*, 71 N. C. 263 (1874) (common law double jeopardy); *State* v. *Thomson*, 76 N. D. 125, 34 N. W. 2d 80 (1948); *State* v. *DeFord*, 120 Ore. 444, 250 P. 220 (1926); *Belter* v. *State*, 178 Wisc. 57, 189 N. W 270 (1922).

A striking case illustrative of this fundamental principle is *Commonwealth* v. *Adkins*, 171 Ky. 299, 188 S. W. 401 (1916). Here, the prosecutor, prior to the impanelment of the jury, requested the trial court to grant a postponement because of the temporary unavailability of a key witness. The trial court refused the request. The defendant then requested that the trial proceed. The trial court directed the jury to be impaneled and when the prosecutor, because of the unavailability of his key witness, declined to proceed with the case, the trial court peremptorily instructed the jury to find the defendant not guilty.

The State appealed to the Kentucky Supreme Court under a special statutory provision. The appellate court agreed that the action of the trial court was an "abuse of discretion" and an "exceptional mistake" but nevertheless said (171 Ky. at 303-04, 188 S. W. at 402):

> "Under these circumstances, the situation was precisely the same as if the trial judge had peremptorily instructed the jury to acquit the defendant after the evidence for the Commonwealth was in or at the conclusion of all the evidence and in obedience to such instruction he was acquitted and discharged. Of course in such a state of case the judgment of acquittal would be a bar to another prosecution for the same offense.
>
> The fact that this power places great authority in the hands of the circuit judges does not furnish sufficient reason to depart from the long established rule

of practice that such a proceeding is a bar to another prosecution for the same offense. The circuit judges of the State are necessarily and properly invested with large power and discretion in directing the control and disposition of criminal cases; and if there should occasionally be a miscarriage of justice on account of an erroneous decision of a judge, an exceptional mistake like this should not be allowed to overturn a firmly settled principle in the administration of the criminal law."

There appear to be only three situations in the history of either English or American criminal jurisprudence where an acquittal in a previous trial has been held not to bar a second prosecution: where the court did not have jurisdiction over the defendant or the offense, where the indictment was so void or defective that a valid judgment could not be entered upon it or where the acquittal was procured by fraud or collusion of the defendant. ORFIELD, CRIMINAL PROCEDURE FROM ARREST TO APPEAL 499 (1947).

None of these situations have any relevance to the present case. Moreover, each of these three situations is sharply distinguishable from the present case because the defendants there were never subject to a valid conviction or were factually in no actual danger of appropriate punishment. In contrast, petitioner could have been validly convicted and punished and thus was in jeopardy within the meaning of the Fifth Amendment from the time the trial began.

B. Defendants Having Once Been Placed in Jeopardy Cannot Be Tried Again Even if the Judgment of Acquittal Could Be Considered a Nullity or Deemed an Order of Mistrial.

The court below recognized that a judgment of acquittal cannot be vacated irrespective of how erroneous or irregular. However, the circuit court agreed with the

Government's contention that the acquittal in the present case was void, holding that it was not only erroneous but beyond the trial court's power. The circuit court then reasoned that since the acquittal was void, a second trial would not place the defendants twice in jeopardy, relying solely upon *Mitchell* v. *Youell*, 130 F. 2d 880 (4th Cir. 1942). In that case the Fourth Circuit, in granting a writ of habeas corpus releasing a prisoner from custody, held that his state court conviction was "void" because he had been tried without benefit of counsel in violation of the Fourteenth Amendment. The court in noting that he was subject to retrial, said:

> "The defense of prior jeopardy will not protect him, for in holding that the trial was a nullity, we hold that he has not been in jeopardy under the charge. It is settled that an accused is not put in jeopardy by a void judgment of conviction, and that upon his discharge thereunder he may be again arrested and prosecuted." (130 F. 2d at 882.)

The reliance by the court below on this case is misplaced. The *Mitchell* case involved a review of a conviction at the instance of the defendant. It has been a well settled principle, since the decision of this Court in *Ball* v. *United States*, 163 U. S. 662 (1896), that the vacating of a conviction upon the appeal or other application of a defendant does not prevent him from being retried. Moreover, the court in *Mitchell*, by calling the conviction "void," merely employed the traditional language used to characterize a conviction based upon a proceeding in which a convicted defendant had been denied a constitutional right. It is only in this context of the abridgement of a convicted defendant's constitutional rights that this Court has said a trial court "no longer had jurisdiction to proceed" and that the conviction rendered could be called "void." See, *e.g.*, *Johnson* v. *Zerbst*, 304 U. S. 458, 468 (1938).

But even labelling the judgment of acquittal a nullity does not change the fact of petitioner's former jeopardy. The constitutional prohibition against double jeopardy, as developed in the decisions of this Court, means that once an accused has been put to trial he has been placed in jeopardy "whether the accused had suffered punishment or not and whether in the former trial he had been acquitted or convicted," *Ex parte Lange*, 18 Wall. 163, 169 (1874), and whether or not a verdict was rendered at the trial. *Green* v. *United States*, 355 U. S. 183, 188 (1957); *Wade* v. *Hunter*, 336 U. S. 684, 688 (1949). See also *Gori* v. *United States*, 367 U. S. 364, 371-72, n. 3 (dissenting opinion).

Petitioner was actually on trial before a competent tribunal for eight days. A valid conviction could have resulted and petitioner stood in danger of punishment. Therefore, petitioner was clearly in "jeopardy" within the meaning of the Fifth Amendment during all this time, and in fact, from the moment the jury was impanelled on September 8, 1960 until the trial was terminated and the jury excused on September 20, 1960.*

The Government apparently recognizing that calling the judgment of acquittal a nullity does not by itself dispel the constitutional bar of double jeopardy, argues that the judgment of acquittal should be deemed an order of mistrial which the petitioner solicited and consented to.**

Factually this Government theory is untenable. Petitioner did not move for a mistrial; petitioner moved for an acquittal or alternatively to strike Rosenholm's testimony; and petitioner would vigorously have opposed any motion

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* Jeopardy is normally said to attach when a jury is impanelled. *Cornero* v. *United States*, 48 F. 2d 69 (9th Cir. 1931).

** Gov't Br. below, pp. 33-39.

for a mistrial. The trial court did not have before it any request for a mistrial, did not grant a mistrial, and did not intend to grant a mistrial. Moreover, it would have been improper, in the posture the case had assumed during the eight days of trial, for the trial court to have taken such action.

But *arguendo* adopting the Government's theory that the judgment of acquittal should be considered as equivalent to an order of mistrial, petitioner still cannot be constitutionally subjected to a second prosecution.

The guiding principle which has been followed by this Court in determining whether a trial court's discharge of a jury prior to a verdict permits the accused to be subjected to a second trial notwithstanding his having been in jeopardy at the first trial, was laid down in *United States* v. *Perez*, 9 Wheat. 579 (1824). In *Perez*, after the first trial had resulted in a deadlocked jury, this Court held a second trial was permissible, saying (at p. 580):

> "... We think, that in all cases of this nature, the law has invested courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject; and it is impossible to define all the circumstances which would render it proper to interfere. To be sure, the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes; and, in capital cases especially, courts should be extremely careful how they interfere with any of the chances of life, in favor of the prisoner. . . . "

In subsequent cases this Court and the lower federal courts have applied the principle enunciated in *Perez* to permit a second trial only where the first trial was terminated before verdict because of "urgent circumstances" and the ends of justice required the mistrial. See, *e.g.*, *Simmons* v. *United States*, 142 U. S. 148 (1891) (discovery of juror's bias); *Thompson* v. *United States*, 155 U. S. 271 (1894) (disqualification of juror); *Wade* v. *Hunter*, 336 U. S. 684 (1949) (military exigencies causing discontinuance of trial); *United States* v. *Potash*, 118 F. 2d 54 (2d Cir. 1941) (juror ill). However, where a mistrial is declared for the purpose of permitting a prosecutor to improve his case, or even to obtain new witnesses, a second trial is barred. *Cornero* v. *United States*, 48 F. 2d 69 (9th Cir. 1931); *United States* v. *Watson*, 28 Fed. Cas. 499 (No. 16651) (S. D. N. Y. 1868). See *Green* v. *United States*, 355 U. S. 184, 188 (1957).

Last term, in *Gori* v. *United States*, 367 U. S. 364 (1961), this Court was faced with a situation where, on the first day of a trial, the trial court had, on its own motion and without the consent of the defendant, declared a mistrial. The majority of this Court, acting on the premise that the mistrial had been clearly granted "in the sole interest of the defendant," held that the subsequent trial of the defendant was not constitutionally barred. The minority felt that there was not such "imperious necessity" for the mistrial as to permit a second trial. However, no sanction was given by this Court in *Gori* to voiding the constitutional protection against double jeopardy where the effect of the mistrial was other than helpful to the defendant. In fact the majority opinion intimated that where the trial is terminated under circumstances where the case is "going badly" for the prosecution thus "affording it another, more

favorable opportunity to convict the accused" a second trial would be offensive to the Fifth Amendment. The same principle was given explicit recognition by this Court in *Green* v. *United States*, 355 U. S. 184, 188 (1957), where it was said that double jeopardy would apply if a trial court subjects "a defendant to a second prosecution by discontinuing the trial when it appears that the jury might not convict."

If the trial court's direction of an acquittal in the present case is considered to be a direction of a mistrial, it is clear that the trial court would then have been giving the Government a second and more favorable opportunity to convict the petitioner. For, there is no question that the trial in the district court was "going badly" for the Government as most strikingly evidenced by the trial judge's stated belief that an ineradicable unfavorable impression had been created by the Government witness Paliatto and that in his opinion the jury would not bring in a conviction. In a new trial the Government witnesses will be "educated" and the forewarned prosecutor can, on his direct examination, blunt the edge of cross-examination, including defendants' use of the witnesses' prior inconsistencies. Thus, at a second trial it is most unlikely that the impact made on the jury by the conflicting and inarticulate testimony of the Government witnesses, which had induced adverse comments by the trial judge, can be recreated.

The Government, notwithstanding the realities of the situation prior to the direction of acquittal, argued in the court below that defendants, by improperly moving for an acquittal, must be deemed to have waived the defense of double jeopardy.* Pursuant to the Government's theory, defendants' action in moving for an acquittal was analogous to their taking an appeal from a conviction, such as in

* Gov. Br. below at pp. 36-39.

Ball v. *United States*, 163 U. S. 662 (1896), or to their consenting to a mistrial, as in *United States* v. *Harriman*, 130 F. Supp. 198, 204 (S. D. N. Y.), *appeal dismissed* 219 F. 2d 918 (2d Cir. 1955). However, as previously discussed, petitioner did not move for a mistrial and in the posture of the trial such a motion was unthinkable.

The very argument the Government here advances—that a request for a direction of an acquittal which is erroneously granted by the trial court waives the protection of double jeopardy—was also made by a state attorney general and ably answered by the state's highest court in *Commonwealth* v. *Ball*, 126 Ky. 542, 104 S. W. 325 (1907). In this case, the State contended that double jeopardy was waived where a trial court, on a motion for acquittal by the defendant, had erroneously granted the acquittal. The court, in rejecting this theory, said (126 Ky. at 547, 104 S. W. at 326):

> ". . . If the defendant may be tried again when he has been acquitted upon a peremptory instruction asked by him, the same rule should be applied when the instruction, though not in form peremptory, is equivalent to a peremptory instruction, or where the rulings of the court in the admission or rejecting of evidence are equivalent to a peremptory instruction. It is incumbent upon the court to give the jury the whole law of the case, and if the defendant had remained quiescent it would have been the duty of the court to decide the question which was raised by him and instructed the jury upon it. The Constitution guarantees the defendant counsel in the management of his case. The right to the assistance of counsel would be a vain thing if the counsel might not raise such questions as they deemed proper. The guaranty that a person shall not be put twice in jeopardy would amount to but little if he could be tried a second time wherever his acquittal was due to an error of the court committed upon his motion. It is immaterial that the

> circuit judge gave the peremptory instruction on the ground that the court was without jurisdiction. We cannot go into the reasons which actuated him. The fact is that under the instructions of the court the jury have regularly found the defendants not guilty, and they cannot be further prosecuted."

Moreover, decisions of this Court touching on other constitutional rights make it clear that the type of waiver or consent which the Government here urges cannot be implied where the result will be the destruction of petitioner's constitutional right not to be "twice put in jeopardy." *E.g., Green* v. *United States*, 355 U. S. 184, 191-197 (1957); *Glasser* v. *United States*, 315 U. S. 60, 70 (1942).

Thus, whether or not the acquittal was erroneous, or the trial court without power to have directed the acquittal or the judgment of acquittal be considered merely an order of mistrial, petitioner was in jeopardy during the first trial below and cannot constitutionally be made to undergo the oppression and harassment of a second trial under circumstances more favorable to the Government.

CONCLUSION

For the foregoing reasons the judgment of the Court of Appeals for the First Circuit should be reversed and the writ of mandamus quashed.

Respectfully submitted,

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APPENDIX A

STATUTES AND FEDERAL RULES INVOLVED

Statutes

28 U. S. C., §1651—Writs

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law . . . . June 25, 1948, c. 646, 62 Stat. 944, amended May 24, 1949, c. 139, §90, 63 Stat. 102.

18 U. S. C., §3731—Appeal by United States

An appeal may be taken by and on behalf of the United States from the district courts direct to the Supreme Court of the United States in all criminal cases in the following instances:

From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof, where such decision or judgment is based upon the invalidity or construction of the statute upon which the indictment or information is founded.

From a decision arresting a judgment of conviction for insufficiency of the indictment or information, where such decision is based upon the invalidity or construction of the statute upon which the indictment or information is founded.

From the decision or judgment sustaining a motion in bar, when the defendant has not been put in jeopardy.

An appeal may be taken by and on behalf of the United States from the district courts to a court of appeals in all criminal cases, in the following instances:

From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof except where a direct appeal to the Supreme Court of the United States is provided by this section.

From a decision arresting a judgment of conviction except where a direct appeal to the Supreme Court of the United States is provided by this section.

The appeal in all such cases shall be taken within thirty days after the decision or judgment has been rendered and shall be diligently prosecuted.

Pending the prosecution and determination of the appeal in the foregoing instances, the defendant shall be admitted to bail on his own recognizance.

If an appeal shall be taken, pursuant to this section, to the Supreme Court of the United States which, in the opinion of that Court, should have been taken to a court of appeals, the Supreme Court shall remand the case to the court of appeals, which shall then have jursidiction to hear and determine the same as if the appeal had been taken to that court in the first instance.

If an appeal shall be taken pursuant to this section to any court of appeals, which, in the opinion of such court, should have been taken directly to the Supreme Court of the United States, such court shall certify the case to the Supreme Court of the United States, which shall thereupon have jurisdiction to hear and determine the case to the same extent as if an appeal had been taken directly to that Court. June 25, 1948, c. 645, 62 Stat. 844, amended May 24, 1949, c. 139, §58, 63 Stat. 97.

Federal Rules of Criminal Procedure

Rule 29—Motion for Acquittal

(a) Motion for Judgment of Acquittal. Motions for directed verdict are abolished and motions for judgment of acquittal shall be used in their place. The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses. If a defendant's motion for judgment of acquittal at the close of the evidence offered by the government is not granted, the defendant may offer evidence without having reserved the right.

* * * * *

Rule 37(a)—Taking Appeal

. . .

(2) Time for Taking Appeal. An appeal by a defendant may be taken within 10 days after entry of the judgment or order appealed from, but if a motion for a new trial or in arrest of judgment has been made within the 10-day period an appeal from a judgment of conviction may be taken within 10 days after entry of the order denying the motion. When a court after trial imposes sentence upon a defendant not represented by counsel, the defendant shall be advised of his right to appeal and if he so requests, the clerk shall prepare and file forthwith a notice of appeal on behalf of the defendant. An appeal by the government when authorized by statute may be taken within 30 days after entry of the judgment or order appealed from.

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Nos. 64 and 65

In the Supreme Court of the United States

October Term, 1961

FOAD, FOO AND EDDIE KAUFF, PETITIONERS

v.

UNITED STATES OF AMERICA

STANDARD OIL PRODUCTS CO., INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 64

FONG FOO AND ROBERT KNUPP, PETITIONERS

v.

UNITED STATES OF AMERICA

No. 65

STANDARD COIL PRODUCTS CO., INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (R. 45–59) and concurring opinion of Circuit Judge Aldrich (R. 59–65) are reported at 286 F. 2d 556–568.

JURISDICTION

The judgment of the court of appeals was entered on February 2, 1961 (R. 65). By orders entered on

February 27 and 28, 1961, Mr. Justice Frankfurter extended the time for filing petitions for writs of certiorari to and including March 15, 1961 (R. 66–67). The petitions were filed on March 7, 1961, and were granted on June 19, 1961 (R. 67–68; 366 U.S. 959). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the power of the trial court to acquit defendants who are properly before it is absolute.

2. Whether, if the power of the trial court to acquit defendants who are properly before it is not absolute, but is subject to limits, the trial court exceeded those limits where it directed the jury to return verdicts of acquittal before the government had completed presentation of its proof of guilt—for one or both of the following reasons:

(a) The prosecutor had spoken privately to a witness during an overnight recess as a result of which the witness had corrected a point in his testimony.

(b) In the court's judgment evidence theretofore offered by the government was not subject to belief.

3. Whether, if the trial court acted in excess of its power, the accused may be retried without violating the constitutional prohibition against double jeopardy.

4. Whether, if the trial court acted in excess of its power and retrial is not barred by the Constitution, the court of appeals had authority under the All Writs Act, by mandamus, to order the district court to vacate the judgment of acquittal and reassign the case for trial.

CONSTITUTIONAL PROVISION, STATUTE, AND RULE INVOLVED

The Fifth Amendment provides in pertinent part:

> * * * nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb * * *.

Section 1651(a) of Title 28 of the United States Code provides:

> The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

Rule 29(a) of the Federal Rules of Criminal Procedure provides in pertinent part:

> * * * The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses. If a defendant's motion for judgment of acquittal at the close of the evidence offered by the government is not granted, the defendant may offer evidence without having reserved the right.

STATEMENT

Petitioners, Standard Coil Products Co., Inc., and two of its employees, Fong Foo and Robert Knupp, were indicted on January 15, 1960, for concealing and conspiring to conceal material facts in a matter within the jurisdiction of an agency of the United States, in violation of 18 U.S.C. 1001 and 371 (R. 6–23). On September 20, 1960, during petitioners'

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trial in the United States District Court for the District of Massachusetts, the trial judge, on petitioners' motions, and prior to the completion of the government's presentation of its evidence in chief, directed the jury to return verdicts of acquittal (R. 559, 572, 575–576). On the following day the trial court entered a formal judgment of acquittal (R. 37). Thereafter, the government filed a motion to vacate the judgment of acquittal as having been entered without authority, which motion was denied without opinion by the trial court (R. 5, 38–39).

On November 3, 1960, the government filed in the Court of Appeals for the First Circuit a petition for a writ of mandamus directing the vacation of the judgment and the reassignment of the case for trial (R. 1–6). Petitioners intervened in this proceeding (R. 39–40). On February 2, 1961, the court of appeals (with a concurring opinion by Judge Aldrich) granted a writ of mandamus directing the district court to vacate the judgment of acquittal and reassign the case for trial (R. 45–65). The order directed that the new trial be before another judge.

The circumstances leading to the entry of the judgment of acquittal were:

1. THE INDICTMENT AND OPENING STATEMENT

The indictment (R. 6–23) charged in nine counts that, beginning in September 1956 and continuing until November 1957, the defendants had conspired to defraud and defrauded the United States by circumventing and falsifying procedures prescribed for testing radiosondes which the corporate petitioner, Stand-

ard Coil, manufactured under contracts with the Army Signal Supply Agency. Radiosondes are electronic devices for furnishing weather information. They are designed to be dropped from airplanes and, while floating to earth by parachute, to transmit continuous radio signals in Morse code indicating the temperature, pressure and humidity of the air through which they pass (R. 7, 92–93, 98–100). The charges involved two contracts and four different tests (R. 6–8, 12–13). Three of the tests were designed to determine the accuracy of the radiosondes with respect to temperature, pressure and humidity, respectively, and the fourth—called the "shock" test—was to check the extent to which the accuracy of the devices in those respects was impaired after being subjected to shocks similar to those they would undergo when their parachutes would open in actual use (R. 7–8, 13; see R. 72, 225). Counts 1–4 charged substantive falsifications with respect to the temperature, pressure, humidity and shock tests, respectively, under one contract (R. 6–12). Counts 5–8 charged like offenses under the other contract (R. 12–17) and count 9 charged a conspiracy to commit the substantive offenses (R. 17–23).

Prior to trial each of the petitioners moved separately to dismiss the indictment (R. 26–27). The court denied the motions (R. 26–27). It granted in part motions for production of documents and bills of particulars (R. 26–27).

In his opening statement to the jury (R. 69–74), government counsel explained the general nature of the charges of the indictment. He stated that the government would present its evidence in two parts—the first part to be evidence explanatory of the instruments involved and the procedures for testing them, and the second part, evidence of the defendants' deliberate falsification of the tests. "Before you can follow the testimony about the falsification of the tests," as counsel explained to the jury, "you will have to know something about the instrument involved, how it was made and how it was to be tested" (R. 70).

2. PALLIOTTO'S TESTIMONY

The government's second witness[1] was Constanz Palliotto,[2] an inspector of electronic equipment for the Army Signal Supply Agency (R. 79). He had been stationed at the corporate petitioner's plant between September 1956 and April 1958 for the purpose of supervising the testing of the radiosondes (R. 81). Pursuant to arrangements of counsel which had been approved by the court, the government planned to call Palliotto twice, first to testify as to "explanatory" matters only and later in the trial to testify as to specific acts of fraud (R. 80, 94, 238, 362–363, 365, 480). (He in fact was never called as a "fraud"

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[1] The testimony of the first witness, who briefly identified certain documentary exhibits (see R. 75–58), has no present relevance.

[2] We shall follow the spelling of this witness's last name as it usually appears in the record. On occasion the reporter spelled it "Paliotto."

witness, as a consequence of the entry of the judgment of acquittal before the government had the opportunity to call him a second time.)

Palliotto explained what radiosondes are, how they operate and the functions of their constituent parts; the physical layout of the plant at which radiosondes were produced; and the procedures whereby they were to have been tested and the results of the tests reported to him as the government's "Quality Assurance Representative" (R. 81–358, 365–480). Due to the subject matter of his testimony, Palliotto's explanations were largely technical in character. The trial court, in order to understand the testimony and to assist the jury in understanding it, participated very extensively in the interrogation of the witness.[3] The judge frequently expressed impatience with the witness for his inability to express himself more clearly (*e.g.*, R. 101, 102, 116, 117, 122, 125, 130, 136, 140, 141, 145), criticized his choice of language (*e.g.*, R. 91, 96, 111–112, 115, 116, 117, 123, 130, 140, 141, 145, 157, 158, 165–166, 187, 196, 231–232, 237, 239, 240–241, 271, 306, 315, 418) and on several occasions appeared to ridicule him (R. 144, 184, 246, 283, 294, 306, 315, 418, 478)—in particular, for his erroneous use in one instance of the word "spurious" (R. 135–136, 144, 246, 283, 315)[4] and for what the court thought was a

[3] As noted by the court of appeals, "An examination of the record shows that while this witness was on direct examination he was asked fully as many questions by the judge as by the Assistant United States Attorney" (R. 47).

[4] The witness used this term to signify "instantaneous," apparently in the belief that it was derived from the phrase "spur of the moment" (R. 135–136).

"strange misuse" of the word "virgin" (R. 144, 184, 294, 361).[5] As the examination of the witness proceeded, the court began to admonish him to be careful in his statements since he was testifying in a criminal case (R. 158, 161, 166, 199, 226, 271, 313, 314, 328, 352, 398, 477) and to indicate by questions and occasionally by sharp comments that it considered some of the witness's testimony unworthy of belief (R. 255–256, 268–269, 313–314, 351–352, 357–358, 401–402, 477–478). On several occasions during the witness's

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[5] The witness, in explaining the parts of a radiosonde, stated that each such device contained among its components 36 strands of human hair (R. 143). Thereafter, the following colloquy ensued (R. 143–144):

"Q. How long are these hairs conditioned in the chamber?

"A. Not less than 6 hours.

"The COURT. Not that it probably has any significance, but are they strands of men's or women's?

"The WITNESS. Mostly women's.

"The COURT. Do they all have to come from the same woman or can you pluck one one day and one another?

"The WITNESS. All I know is that they have to be virgin hair.

"The COURT. What? [Laughter.] What do you mean by 'virgin hair'? It certainly doesn't mean what it sounds like.

"The WITNESS. That is hair that has not been subjected to dyes or any cosmetics, and so forth.

"The COURT. You mean hair in its natural state?

"The WITNESS. Yes.

"The COURT. It has nothing to do with being a virgin?

"The WITNESS. No, sir.

"The COURT. All right. Does it have anything to do with the age of the person?

"The WITNESS. I can't answer that, sir.

"The COURT. This is the most spurious virgin hair that—I would like to know, really, what it is that you are describing. Is it the hair of a child?

[Cont'd. on next page.]

testimony, the court also reprimanded government counsel for acts and statements which it considered objectionable (R. 169, 197–198, 203, 262).*

3. THE COURT'S SUGGESTION THAT THE PROSECUTION BE ABANDONED

In the course of cross-examination Palliotto was asked whether he had destroyed notes or records of

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"The WITNESS. I couldn't tell you the answer, sir, whether it would be child's hair or a young lady's or an old lady's. That is something that would have to be answered by engineers that specialize in that particular field.

"The COURT. I have recently seen some witch doctors in Ghana and Nigeria but I must say nothing they offered in the way of juju was any more mysterious than your leaving this hair. I can't tell whether it is like the monkey's skull——

"The WITNESS. It is human being hair, mostly women's.

"The COURT. You don't know anything about it?

"The WITNESS. No, all I know, at the present time we are having difficulty procuring.

"The COURT. There are plenty of women but maybe not plenty that meet your description, but I don't know."

Subsequently, in referring to the witness's "strange misuse of language," the court incorrectly quoted Palliotto as having said "virgin women's hair" (R. 361).

* The principal incident involved counsel's reply to a question by a defense attorney as to whether the government claimed that any "particular tape" (on which radiosonde signals were recorded) or "data sheet" was false. Counsel stated that the government did not claim that any particular tape or data sheet was false but that it did claim and would prove that all test results submitted to the government inspector were "permeated" with fraud and that this "couldn't help but * * * produce false test results" (R. 197–198). The court, characterizing counsel's answer as "extravagant" and "unseemly" for stating more than was called for by the question, said that if it had been "delivered to the Jury instead of to the Court, it would be proper to have a mistrial." The court added, however, that it attributed counsel's statement to "inadvertence" (R. 198).

his activities at the plant or tapes which reported the results of tests run on radiosondes. He answered yes and was questioned further as to whether any of the notes, records or tapes had been destroyed following his learning of the commencement of an investigation by the F.B.I. The witness expressed some confusion and difficulty in recollecting the sequence of the various events, and testified initially that he had not destroyed materials after learning of the F.B.I. investigation (R. 245–248, 351–353, 357–358). Upon clarification and development of the exact timing of his first knowledge of the investigation, Palliotto changed his testimony and acknowledged that he had thereafter destroyed documents or notes (R. 352) and tapes (R. 358).[7]

The court thereupon excused the jury (R. 358) and asked government counsel whether there was "any other principal Government witness with respect to the kind of items which have been covered by the witness on the stand" (R. 359). Informed that there was one other, the court asked if his credit would "stand better after examination than this witness' credit." Government counsel said his credit would "be good," and that Palliotto was "just a little confused." (R. 359.) The court replied (*ibid.*):

> A little confused? This has gone on for two or three days. I am going to tell you that if I were the United States Attorney in this case and my principal witness were testifying as this witness has done I would forthwith nol prosse the case.

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[7] Neither the court nor defense counsel took the position, or even suggested, that the destruction of these materials precluded a fair trial.

Government counsel acknowledged that Palliotto's explanations had "not been as clear as they might be," and pointed out to the judge that the witness was testifying only as to "explanatory material"; that he had not been called "at this stage to testify to any matter concerning the fraud"; and that he was not the government's "principal witness by any stretch of the imagination" (R. 359).

Notwithstanding this explanation, the court announced a 15-minute recess to enable the United States Attorney and his assistants to "consider whether the public interest is served by a further prosecution of this case" (R. 359). Following the recess, the court explained to the United States Attorney, who had meanwhile joined his assistants in the courtroom, why he had asked the government to consider whether to "nol pros the case at this stage" (R. 360). Stating that "[a] judge ought not to deceive himself into believing that he knows how a jury will act," the court said that it nevertheless felt "reasonably confident" that there was "no chance whatsoever" that the jury would convict the defendants if conviction required "any credit of Mr. Palliotto" (*ibid.*). The court said it was making "no statement as to whether the defendants are guilty or not guilty" but was considering only the fact that the court and jury were (*ibid.*)—

> presented with the testimony of a man who may intend to tell the truth but seems absolutely incapable of so testifying as to persuade neutral persons that he has a mind with a discriminating capacity to observe, the strength to remember, the skill to narrate, and the total awareness

> of the proceedings in which he, and more particularly the defendants, find themselves.

The court stated that "[i]f it were not so serious a matter, it would be humorous to refer to the kinds of things which this witness has said" (R. 360). It then referred to instances in the witness's testimony which rendered it ambiguous and confusing—including the witness's "humorous blunder" in the use of the word "spurious" and what seemed to the court a "strange misuse" of the word "virgin"[8] (see *supra*, p. 8)—and said that a witness who had "so little understanding of the language" and had "so frequently made utterances which have confused the Court, and I feel certain the Jury" was a "very slender reed on which to make a man's fate depend" (R. 360–361). "[I]f in the end the Jury did believe this witness," the court said (R. 362)—

> I think it would be almost inevitable that I would have to set aside the verdict as not being a verdict * * * based upon evidence beyond a reasonable doubt.

The United States Attorney pointed out that "this witness was called for a limited purpose not central to establishment that wrongdoing had occurred," and that it was the view of the government that, "whatever the Jury's impression of this witness," its verdict as to the defendants' guilt or innocence should rest upon the testimony of witnesses yet to be called, who would testify that "under the instructions of the defendants they did not follow the procedures prescribed [by the

[8] The judge said he thought that the witness's "virgin" reference "did not prejudice" the accused (R. 361).

terms of the contracts] and * * * in fact falsified those procedures" (R. 362). Government trial counsel added that this aspect of the case "could well have proceeded by introduction of the documents, particularly the specification[s], which set forth the test procedures, and then the fraud witnesses could have been called." He explained that he called Palliotto primarily to explain how the testing procedures were supposed to work, in the belief that the jury would thereby be able to understand that aspect of the case better than if the printed documents were merely read to them (R. 362–363). Stating that he "had not anticipated by any stretch of the imagination that [Palliotto's testimony] would take this long,"[*] he told the court that "[t]he fraud witnesses" were present and had been for many days; that the court had "not heard one-tenth of the testimony * * * and none of the fraud testimony"; that it was unnecessary for Palliotto's testimony to be credited "in any degree in order for a conviction to stand," since "the documents * * * sp[oke] for themselves as to the test procedure[s]"; and that for these reasons he felt that he would be "derelict in [his] duty in not proceeding with the case" (R. 363). The United States Attorney joined in these statements of his trial counsel and added (R. 363):

> [T]o draw a conclusion based upon the testimony of this witness would not fairly give the government an opportunity to present to the Court and Jury the evidence on which the

[*] The trial was then in its fifth day (R. 334).

> Grand Jury proceeded in charging these defendants.

The court said that, although it had not intended to suggest that the defendants were innocent, it still felt that, regardless of what testimony other witnesses might give, there was "not * * * a chance" that the jury would convict because "the impression" created in the jurors' minds by Palliotto's testimony was "now ineradicable."[10] Nevertheless the court said it was "going to allow the government to go ahead" (R. 364).

4. ROSENHOLM'S TESTIMONY

The jury was then recalled and the cross-examination of Palliotto proceeded (R. 365–424). Following completion of his testimony and the relatively brief testimony of a third government witness (R. 481–499),[11] the government called its first "fraud" witness, Robert Rosenholm (R. 500).[12] During the pertinent period Rosenholm, an alleged co-conspirator (R. 20–21), had been the "final inspector" of radiosondes for Standard Coil (R. 501–502). As in the case of Palliotto, the court participated extensively in the direct examination of the witness (R. 500–555, 559–566) and was frequently critical of his manner of ex-

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[10] The clerk, asked by the judge if he did not agree with this estimate, replied, "So far" (R. 364).

[11] The third witness was the general manager of the plant where the radiosondes were produced (R. 481). He identified the positions held by the individual petitioners and described the functions they performed.

[12] Rosenholm was the first witness to testify to actual fraudulent activities on the part of the accused (see, *e.g.*, R. 510, 512, 529, 531, 533, 534–535, 537, 561–563).

pressing himself (*e.g.*, R. 518, 522–524, 538, 539–540). Once, on his own initiative, the witness corrected himself as to a certain point just made. He had testified that he used to hand one of the test operators small "cards" on which information relating to the tests was printed (R. 543–546). Explaining that he had been previously "confused" (R. 546), the witness testified that he had given the test operator small "piece[s] of paper" on which he had copied the information from certain charts (R. 546–548). This voluntary change of testimony on direct examination was later referred to by the court (on the occasion of the entry of the judgment of acquittal, see *infra*, p. 23, note 18) as evidencing "either a lamentable lack of memory or an extraordinary power of inventiveness" (R. 575). During this witness's testimony, as during Palliotto's, the court took occasion to rebuke counsel for conduct which it deemed objectionable (R. 533, 535, 543, 549–550).[13]

5. ROSENHOLM'S CHANGE OF TESTIMONY AS TO A DATE

Toward the close of the seventh day of the trial, Rosenholm testified on direct examination to a certain conference at which Standard Coil's outside counsel, a Mr. Teichman, was present (R. 551–555). The witness was "not sure" of the date of the conference (R. 552). Pressed by the court for his best recol-

[13] One incident involved government counsel's pursuit of a line of questioning which the court believed was "in defiance of" a prior ruling (R. 549). Counsel protested that he had not meant to defy the court (*ibid.*). On another occasion the court reproved one of the defense attorneys for the "intimidati[ng]" manner in which, the court thought, the attorney had phrased an objection (R. 543).

lection, he fixed the year as 1958 and said he believed it was in February but was not sure (*ibid.*).[14]

A colloquy then occurred between court and counsel as to whether the corporate petitioner had a right under the attorney-client privilege to object to the admission of statements made to Mr. Teichman at this conference by corporate personnel (R. 555–557). Government counsel stated that the government proposed to prove that at that conference Mr. Teichman, an agent of the company, was apprised of the fraudulent activities that were "going on" at the plant; that thereafter no steps were taken to stop them; that the "people involved [were] retained" in the same jobs; and that in fact attempts were subsequently made to conceal what was going on (R. 557). The court ruled that if the government proved these things it would "let the conversation in," but not otherwise (R. 557). Following further colloquy (R. 557–558), the trial was recessed to the following day (R. 558–559).

When the witness resumed the stand the following morning, government counsel directed his attention to his testimony of the previous day that the approximate date of the conference with Mr. Teichman was February 1958. Counsel asked if the witness was sure of that date. The witness said he was not sure, that his best recollection was that it took place in "[a]pproximately September 1957" (R. 559). The

[14] If February 1958 had in fact been the date of the conference, it would have occurred after the terminal period of the conspiracy charged in the indictment (September 1956–November 1957). See *supra*, p. 4; R. 20–21.

court asked the witness if he had talked with government counsel while testifying, and the witness said he had (R. 559–560). Government counsel requested leave to "approach the bench," but the court refused, saying "[T]hat requires no explanation. It isn't in a criminal case, correct" (R. 560).

Following further direct testimony, during which the Teichman conference was not adverted to (R. 560–565), government counsel stated that he had concluded with the witness for the time being, but that he desired to recall him at a later time after a foundation had been laid for questions concerning what had been said at that conference (R. 565). This procedure was approved by the court (R. 565–566) and defense counsel commenced cross-examination (R. 566).

6. THE MOTIONS FOR ACQUITTAL

On cross-examination Rosenholm acknowledged that he had changed his testimony as to the date of the Teichman conference after talking with government counsel, Mr. Caner, during the recess (R. 567–568). The court at this point excused the jury and asked Mr. Caner if he wished to make any statement "as a matter of personal privilege" before the court "take[s] action" (R. 568). Mr. Caner answered that he was unaware of any impropriety in an attorney's speaking to a witness during a recess in order to ask him if his testimony on a particular point was accurate, and expressed complete astonishment that the court should think his action improper (*ibid.*). The court then directed the witness to leave the courtroom and, when Mr. Caner again said he had never known any impropriety in what he had done,

the court replied, "You will very soon learn" (R. 569). It then addressed Mr. Caner as follows (*ibid.*):

> You were here and you knew he was on the stand. You knew there was a recess. You know the principle that a witness must be examined in public. You know that, without suggesting for a moment that you offered any improper inducement, tampering with a witness is one of the most dangerous things in connection with a case, and particularly a criminal case, that a person should be left entirely alone during the course of his testimony. You must know that elementary fact and elementary rule.

Mr. Caner said he wanted "to disclaim any intention or act of tampering with the witness" (R. 569). Mr. Mitchell, the associate prosecutor, advised the court that it was "partly at [his] suggestion" that Mr. Caner spoke to the witness, and explained that he and Mr. Caner "wanted the truth [as to the date of the Teichman conference] to come out." The court replied that it was "glad that the truth has come out" (*ibid.*).

The court said that it was "not proposing to take any disciplinary action" against either government attorney; that it was "merely interested in whether this is a situation in which I must respond to a motion" (R. 569–570). Mr. Caner advised the court that the date of the conference was "a matter that other witnesses will testify to * * *. It can be ascertained when it happened" (R. 570). He then explained what had occurred at his conversation with the witness (*ibid.*):

> * * * I asked the witness whether the discussion with Teichman was before or after the

> FBI investigation, and whether he made the statement [15] in the course of the FBI investigation.
>
> I showed him the statement, and he observed the date on the statement. I then asked him what was his best memory as to the date at which the conversation with Teichman took place, and he stated that it was September of 1957. That was what happened, and I have never been aware of any impropriety [in] doing such a thing, your Honor.

The court said that it had not meant to suggest that counsel had knowingly done anything "wicked"; that it was (R. 570):

> merely inquiring as to what the facts were, and whether that constitutes such a prejudice to the defendants, quite apart from your intent, as to create a situation in which the Court must act in response to a motion.

Mr. Caner replied that (*ibid.*):

> no prejudice to the defendants arises, because the true facts will come out during the course of trial as to when the discussion occurred.

Following further colloquy, in which a defense attorney said he did not intend to "infer any conscious wrongdoing" by government counsel and the court reiterated its belief that counsel had knowingly done nothing wrong (R. 571), counsel for each defendant moved for a judgment of acquittal (R. 572).[16] Government counsel opposed the motions on

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[15] Apparently this refers to a statement concerning the conference which the witness made to the F.B.I.

[16] Counsel for the corporate petitioner moved in the alternative that the witness's testimony be stricken (R. 572).

the ground that a dismissal would serve neither justice nor the public interest (*ibid.*). He pointed out (*ibid*):

> There are many witnesses to be heard from, many more besides this witness. We have not heard the testimony of any of the test operators. We have only heard three witnesses in a case involving many witnesses.

"[T]he very most" that the court should do, he argued, was to strike the witness's testimony or such part of it as the court felt to be vitiated by the action of counsel which the court thought improper (R. 572).

7. THE JUDGMENT OF ACQUITTAL

The court thereupon recalled the jury, directed the witness to resume the stand (R. 572), and, following a statement to the jury (R. 572–575), directed it to return verdicts of acquittal as to all defendants (R. 575). The court's statement indicated that the principal basis for its action was its belief that government counsel's conversation with witness Rosenholm, resulting in the witness's change of testimony, constituted an infringement of the defendants' civil rights. Thus, the statement to the jury—which is reproduced in full in the Appendix (*infra,* pp. 63–66)—began (R. 572–573):

> Mr. Foreman and Members of the Jury, before I say anything else, let me make it absolutely clear that counsel for the defendants as well as the Court are persuaded that neither the United States Attorney nor either of his

> assistants consciously or deliberately violated any canon with which they were familiar. They were acting subjectively in good faith, and I do not mean at any stage of the remarks I am about to make to criticize them in the sense that I believe that they were conscious wrongdoers.
>
> On the other hand, a criminal prosecution is the most solemn proceeding which takes place in a court, and one of the most solemn activities with which man could be concerned on earth. The standards of a criminal prosecution in the United States require a constant awareness of the rights and liberties guaranteed by the United States Constitution, and a constant sensitivity with respect to the value of an open trial conducted with a full protection of the rights of any individual or any corporation summoned to answer a criminal charge.

After referring to Rosenholm's original testimony as to the date of the Teichman conference and asserting the "vital" importance of the date,[17] the court declared (R. 574–575):

> During the recess, and without in any way being conscious of a potential violation of any canon of ethics or any rule or principle, the Assistant United States Attorneys in this case admittedly conferred with this witness who was on the stand, and the conference with him took place either in the offices of the United States Attorney or in some similar place. It took place this morning before court, not under the supervision of a judge, and without the

[17] See note 14, *supra*, p. 16.

> presence of the defendants or counsel for the defendants.
>
> In this situation the witness took the stand this morning and on this very vital point gave an altered version in which the date now given becomes quite significant and has a connotation and importance which the date he gave yesterday did not have.

The court then referred to the principle that "many things which are true are not allowed to be shown" (citing the inadmissibility of true but involuntary confessions and of relevant but unlawfully seized evidence), and concluded (R. 575):

> These principles illustrate the sensitivity of American courts to fair play in connection with every aspect of the criminal law. It is not the duty of a court to see that every guilty man is punished. It is the duty of a court to see that every man gets a fair trial. The highest public interest is not the punishment of the wicked, but the establishment and maintenance of justice under law.
>
> Bearing in mind those principles, and responding to the motions of acquittal made by counsel for the individual defendants and the corporate defendant, I direct you at this stage to return the verdicts of acquittal with respect to each of the individuals and with respect to the corporation.

In addition, the court referred in a disparaging manner to the general character of the testimony of the two principal witnesses whom the government had so far had the opportunity to call, Palliotto and Rosenholm. The court said that these witnesses had shown "a lamentable lack of awareness or lack of ca-

pacity in connection with their testimonial obligations" (R. 573). The court related an anecdote about a judge who told the jury that he did not believe the witnesses for either side in a case before him—which story, he said, had "considerable application" to this case (R. 573–574).[18]

At the conclusion of the statement, the court directed the individual defendants to stand and said to them (R. 576):

> You have been acquitted by direction of the Court and by the Court. Your bail is terminated. You are free.

A formal judgment of acquittal as to all three defendants was entered on the following day (R. 37).

SUMMARY OF ARGUMENT

I

The public, represented by the government, has a fundamental right to have a person indicted by a grand jury placed on trial for the crime charged, provided that a fair trial can be held. No judge has the power merely by entering a judgment of acquittal to deprive the public of its right to a hearing.

In this case the district judge attempted to acquit without a hearing. He directed a verdict before listening to the prosecution's case or otherwise ascertaining what evidence the prosecution could produce.

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[18] The judge also referred to Rosenholm as a witness who had shown "either a lamentable lack of memory or an extraordinary power of inventiveness." He alluded in this connection to Rosenholm's change of testimony as to "the cards" (see *supra*, p. 15; R. 575).

To judge evidence insufficient before hearing it, or even taking steps to ascertain what the evidence will be, is to deny a hearing; for the very idea of a hearing presupposes an effort to express a rational judgment and one cannot express a rational judgment upon what he has not even allowed to come to his attention. Therefore, the power to acquit for insufficient evidence does not arise until the court has heard the government's case or otherwise informed itself concerning it.

In the present case, the judge neither heard the evidence nor informed himself concerning it. As the majority of the court of appeals observed, he "abruptly terminated the Government's case * * * long before the Goverment had had an opportunity to show whether or not it had a case; and, moreover, he did so in ignorance of either the exact nature or the cogency of the specific evidence of guilt which Government's counsel said he had available and was ready to present" (R. 55).

Nor does the court have the power to enter a judgment of acquittal as a method of disciplining the prosecution for actual or supposed misconduct during the trial—at least not unless the conduct prevents holding a fair trial within a reasonable period. In the present case, there was no misconduct, but even if misconduct had occurred, the proper remedy would have been to declare a mistrial and impose such punishment upon the Assistant United States Attorney as the court deemed proper. "A criminal prosecution is more than a game in which the Government may be checkmated and the game lost merely because its

officers have not played according to rule." *McGuire* v. *United States*, 273 U.S. 95, 99.

Since the district judge had no power to direct a judgment of acquittal, the judgment was a nullity.

II

A new trial—the first true hearing—would not subject the defendants to double jeopardy in violation of the Constitution, for the supposed acquittal, being a nullity, will not support a plea of *autrefois acquit*.

In securing the constitutional right against double jeopardy, the courts must guard against "the mechanical application of an abstract formula" (*Wade v. Hunter*, 336 U.S. 684, 691). The purpose of the rule is to prevent oppression of the defendant. The bare fact that a jury has been impaneled and a trial has begun does not confer upon the defendants an unqualified right, if the trial is terminated, "to receive absolution for the crime." *United States* v. *Gori*, 282 F. 2d 43, 48 (C.A. 2), affirmed, 367 U.S. 364.

Where a district court terminates a trial without power, so that its action is a nullity, a new trial is no different from what occurs when the first trial is frustrated by supervening external circumstances, *e.g.*, *Wade* v. *Hunter*, *supra*. Similariy, the Court stated just last Term that a new trial was not unconstitutional where the district judge had earlier declared a mistrial "without the defendant's consent and even over his objection." (*Gori* v. *United States*, 367 U.S. 364, 368). From a constitutional standpoint, it should make no difference whether the judge declares a mistrial or exceeds his power and enters a purported judgment of acquittal.

Indeed, the argument that the plea of *autrefois acquit* is not available is stronger where the judge has acted without authority, *i.e.*, in excess of his jurisdiction, for it is well settled that the invalid judgment of a tribunal that lacked jurisdiction will not bar a subsequent prosecution before a tribunal having power to convict.

III

The court of appeals had the power to issue a writ of mandamus to order the purported judgment of acquittal vacated and the defendants placed on trial. The power to issue mandamus is conferred by the All Writs Act. It may be used in aid of appellate jurisdiction "to confine an inferior court to a lawful exercise of its prescribed jurisdiction" (*Roche* v. *Evaporated Milk Association*, 319 U.S. 21, 26). On this point, the present case is covered in principle by *Ex parte United States*, 287 U.S. 241. In that case the district court had refused to issue a bench warrant for the arrest of a defendant against whom an indictment fair on its face had been returned. This Court granted a writ of mandamus directing the district court to issue the warrant because the effect of the district court's refusal had been to deny the government its right to put the accused on trial. In the instant case, the district judge's premature entry of a verdict of acquittal denied the government its right to put the accused on trial, in every true sense of the word "trial," and the writ of mandamus should issue for the same reasons as in *Ex parte United States*.

ARGUMENT

Our position that the judgment of acquittal was a nullity rests upon the proposition that the public, represented by the government, has the same fundamental right to be heard before a person charged by the grand jury is acquitted that the defendant has to be heard before he can be convicted. When there is not even a pretense of hearing the government's case, an arbitrary judgment of acquittal cannot eliminate beyond recall the public's right to a day in court. Petitioners' case, on the other hand, rests on the proposition that "the power of a trial judge to acquit defendants who are properly before him is absolute" (F. Br. 24; see also F. Br. 58, 60; S. Br. 35).[19] The historic ideal of a fair trial, which is the right of the public no less than the defendant, neither requires nor permits a single judge to exercise such absolute power. Now to order a trial—the first true hearing—would not subject defendants to double jeopardy. The All Writs statute gave the court of appeals jurisdiction to correct the assertion of nonexistent power.

I

THE JUDGMENT OF ACQUITTAL WAS VOID AS IN EXCESS OF THE COURT'S POWER

A majority of the court of appeals (Chief Judge Woodbury and Judge Hartigan) were "not * * * sure" whether the trial judge directed acquittal of the petitioners because he thought the testimony of

[19] "F. Br." refers to the brief of the individual petitioners, Fong Foo and Robert Knupp (No. 64). "S. Br." refers to the brief of Standard Coil Products Co., Inc. (No. 65).

two of the four witnesses put on by the United States at the outset of the trial was not entitled to belief or because he thought the action of the Assistant United States Attorney in talking with a government witness during a recess called while the witness was on direct examination deprived the defendants of some basic civil right. "But whether the judge acted as he did for one reason or for the other, or for both reasons in combination," the majority held, "his action was not only plainly erroneous but beyond his jurisdiction" (R. 50).

While Judge Aldrich agreed that the acquittal was void if it was based upon the prosecutor's action in speaking to the witness (R. 62–64), he was of the view that the judgment would have been valid (even though erroneous) if it were based upon the trial court's disbelief of the testimony (R. 59–62). However, he had "no reluctance in concluding" that "the reason [the district court] granted the motions for acquittal was the same one that caused it to invite them," namely, the action of government counsel in speaking to the witness. Judge Aldrich therefore concurred in the result (R. 64–65).

Although we agree with Judge Aldrich that the trial court acted to acquit because of the conduct of government counsel in speaking to the witness,[20] we

[20]Apparently this was also the view of petitioners Fong Foo and Robert Knupp, as indicated at p. 6 of their reply brief on their petition for a writ of certiorari.

As we read the trial court's statement to the jury at the time it directed the acquittal (*supra*, pp. 20–23; Appendix, *infra*, pp. 63–66) and the record of the antecedent events (*supra*, pp. 7–20), the alleged unreliability of the two prin-

do not agree that the acquittal was valid if based in part on the court's view as to the credibility of the testimony thus far adduced by the government. On this point we believe the majority was correct: the acquittal was *ultra vires* even if the judgment was based in part on the latter ground. In our discussion we assume that both factors influenced the court.

EXCEPT WHERE THE GOVERNMENT ACKNOWLEDGES THAT IT CANNOT OR DOES NOT PROPOSE TO PROVE A FACT DEEMED BY THE COURT ESSENTIAL TO CONVICTION, A COURT IS WITHOUT POWER TO ENTER A JUDGMENT OF ACQUITTAL UNTIL IT HAS HEARD THE EVIDENCE OF GUILT

1. The government rests its case on the fundamental proposition that the public has a right to be heard. Petitioners, on the other hand, contend that no such right exists, that the judge has an absolute power to acquit a person accused by a grand jury without hearing the evidence. Their contention rejects the idea of a trial as a rational search for truth. It would destroy the very meaning of the word. For a trial is a hearing, and it is as irrational for the judge to make a finding of "not guilty" upon evidence which he has not heard as it would be to allow the jury to convict before the defendant had put in his case.

Acquittal on the basis of the facts—the "legal and formal certification of the innocence of a person who

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cipal government witnesses was but incidental to the actual reason for acquittal—counsel's conversation with witness Rosenholm during the recess. See also Judge Aldrich's discussion at R. 64–65.

has been charged with crime"[21]—necessarily implies a judgment arrived at after hearing and evaluation of the evidence. It is a determination that the evidence brought forward by the prosecution is insufficient to justify a finding of guilt. Except where the prosecution acknowledges in advance that it cannot or does not propose to prove a fact deemed by the court essential to conviction (a case distinct from that presented here, see *infra,* pp. 33–36), the court must inform itself upon *all* the evidence of guilt before it is in a position to judge it insufficient.[22]

A court which has heard the proof of guilt is equipped to evaluate it. It then possesses the means for passing judgment whether to require the defendant to come forward with proof of his innocence or whether to acquit. At that point the court has the naked *power* to acquit even where the evidence of guilt may be strong—or would so appear to other judges or to an appellate court.[23] Such a determination, however arbitrary or mistaken, would involve at most an uncorrectible abuse of power for which the law provides no remedy. But unless the court has *heard* the proof or knows what the proof will be, it is simply not in a position to make a judgment as to the innocence of the accused.

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[21] Black's Law Dictionary (3d ed.), "Acquittal".

[22] This statement is subject to one qualification: if all the evidence is in upon an essential element of the crime, then the judge would have held a hearing upon that aspect and would have power to judge the evidence insufficient.

[23] At least it can be so assumed for purposes of this case, *arguendo.*

It is because of this fundamental irrationality that a "trial" lacks the substance of a hearing until the court has heard the prosecution's evidence: and without a hearing, we say, a court lacks the power to acquit. For this reason we cannot agree with the suggestion of the concurring judge below that the majority, in holding that the trial court exceeded its power in acquitting the petitioners before it heard the prosecution's evidence, was "misled by the relative magnitude of the district court's error into confusing a difference in degree with a difference in kind" (R. 62)—into failing to distinguish between egregious error and lack of power. The difference between denying the substance of a hearing and misjudging the evidence which has been heard is not a mere difference in degree, as this Court has recognized in many contexts.[24] The one vitiates the entire proceeding and thus is jurisdictional; the other is but a wrongful exercise of existing power. We also suggest that Judge Aldrich's observation that "[i]t is not always necessary to eat the whole of an egg to know it is rotten" (R. 61)—while true—is inapposite. The presence of one bad egg in a large basket hardly proves that all the eggs are rotten. A single egg is integral, at least in terms of rottenness. The eggs in a basket are usually discrete. The different parts of a prose-

[24] *E.g., The Japanese Immigrant Case*, 189 U.S. 86, 100–101; *Chin Yow* v. *United States*, 208 U.S. 8, 13; *Zakonaite* v. *Wolf*, 226 U.S. 272, 274–275; *Frank* v. *Mangum*, 237 U.S. 309, 326; *Kwock Jan Fat* v. *White*, 253 U.S. 454, 457–458; *Morgan* v. *United States*, 298 U.S. 468, 479–482.

cutor's evidence are also separable, for the shortcomings of one witness's evidence are not attributable to the witnesses to follow. Except where all the proof upon an essential element of the crime has been introduced, or the prosecution has conceded its inability or lack of intent to establish a fact which the trial court deems necessary (pp. 33-36, *infra*), the insufficiency or unreliability of one part of the prosecution's case has no tendency to prove that the other parts, not yet heard or even summarized, are inadequate. As the majority observed (R. 55), the trial judge—

> abruptly terminated the Government's case * * * long before the Government had had an opportunity to show whether or not it had a case; and, moreover, he did so in ignorance of either the exact nature or the cogency of the specific evidence of guilt which Government's counsel said he had available and was ready to present.

Although the conclusion that the trial judge exceeded his authority flows from consideration of the nature of the trial process and does not depend for its validity on a particular rule or statute, it is confirmed by Rule 29(a) of the Federal Rules of Criminal Procedure (*supra*, p. 3). That rule authorizes the entry of a judgment of acquittal "after the evidence on either side *is closed*" (emphasis added)—where the evidence is insufficient for conviction. The clear implication is that—aside from the exceptional case not presented here, *i.e.*, where there is a concession by the government, in advance of completion of the presentation of its case, that it cannot or will not prove a fact thought essential by the court—an acquittal at any prior time is unauthorized. The rule thus gives ex-

plicit recognition, and the force of law, to a requirement rooted in logic.

Thus, even if it be assumed (contrary to the fundamental principle that the credibility of the witnesses is for the jury) that a court has the power to acquit an accused solely because it deems unreliable, or disbelieves, all the witnesses offered by the prosecution, it is clear that, at the least, it must first have heard their testimony. As the court did not do so here, it was without power to acquit.

2. This is not to say that there are no circumstances under which a court can enter a valid judgment of acquittal until it has heard all the evidence the government proposes to present. There is one well-recognized exception. A court may validly acquit without waiting to hear the government out where it appears from the opening statement, from a subsequent stipulation or concession, from completion of the evidence upon an essential element of the offense, or in any other manner, that the government cannot or does not propose to prove a fact which in the court's view is necessary to convict. *McGuire* v. *United States*, 152 F. 2d 577, 580 (C.A. 8); *Stuthman* v. *United States*, 67 F. 2d 521, 523 (C.A. 8); *United States* v. *Dietrich*, 126 Fed. 676, 677–678 (C.C. D. Neb.); *United States* v. *Maryland Cooperative Milk Producers*, 145 F. Supp. 151, 152 (D. D.C.).[25] In such cases the essential right to a hearing is preserved. The government cannot complain that the public has not been heard if upon its own state-

[25] A like rule obtains in civil cases. *Best* v. *District of Columbia*, 291 U.S. 411, 415; *Liverpool Steamship Co.* v. *Commissioners of Emigration*, 113 U.S. 33, 37; *Oscanyan* v. *Arms Co.*, 103 U.S. 261, 263.

ment of its case, upon its concession, or upon full presentation of the evidence on an essential element of the crime, a fatal defect appears. As observed by Circuit Judge (later Mr. Justice) Van Devanter in *United States* v. *Dietrich, supra,* 126 Fed. at 677–678—

> The court has the same power to act upon such an admission that it would have to act upon the evidence if produced. It would be a waste of time to listen to evidence of other matters when at the outset a fact is clearly and deliberately admitted which must defeat the prosecution in the end.

United States v. *Weissman,* 266 U.S. 377, as the concurring opinion below recognized (R. 60), involved essentially an application of this principle. Petitioners' reliance on that decision for the proposition that a court which has jurisdiction of the cause has absolute power to render a valid judgment of acquittal at any stage in the proceedings (F. Br. 56–57, 59; S. Br. 35–36, 39, 51) is misplaced. The government sought there to appeal from a verdict of not guilty directed by the trial court after the impaneling of the jury but before any evidence had been presented or opening statements made. The government argued that the trial court had exceeded its authority. This Court sustained the authority of the trial court and dismissed the appeal. The basis of the trial court's action, however, was that "no valid conviction could be had" because the indictment failed to charge an offense.[26] 266 U.S. at 378. This, as we have seen, is

[26] The fact that the court might have been wrong in its construction of the indictment did not affect its power to acquit. Similarly, the fact that a court might be wrong in its belief that a certain fact must be proved in order to sustain a con-

precisely the kind of situation in which a court may validly acquit without waiting to hear the government's evidence since, regardless of what the evidence may be, the prosecution must fail in the end.[27]

No such exceptional situation existed here. If the evidence moved the court to acquit, it was not because an incurable defect had appeared but because the court believed that Palliotto and Rosenholm were not credible witnesses.[28] But rejection of the entirety of their testimony would not have been fatal to the government's case. Palliotto's testimony (*supra*, pp. 6–14) related solely to preliminary matters of an explanatory or "background" character. It was meant to help the jury understand the testing procedures in order to assist them later in following the "fraud" testimony and was not necessary to prove the offenses alleged. As the prosecutor explained, the government could have proved this part of its case solely from documentary evidence.

Rosenholm, although a witness to specific fraudulent acts, was only the first such witness. As govern-

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viction would not affect its power to acquit when the government acknowledges its inability to prove that fact.

[27] Under the circumstances *Weissman* has no bearing on the issue here, which is whether an acquittal granted in excess of the court's power may be vacated to permit retrial. It may be noted further that the Court was not presented with the question whether the valid verdict of not guilty granted on the ground that the "indictment was invalid because no offence was properly charged," 266 U.S. at 378, was a bar to subsequent prosecution of the defendant under a proper indictment.

[28] The other, and we believe principal, basis of the judgment—the fact that the prosecutor spoke to Rosenholm during a recess—has no relation to the sufficiency of the proof, the lack of which is the normal ground for a judgment of acquittal. That basis of the judgment is discussed *infra*, pp. 37–40.

ment counsel advised the court, there were many more "fraud" witnesses yet to be heard, including the persons who actually conducted the tests and thus had specific and personal knowledge of their fraudulent character (R. 572). The court could not know whether the witnesses still to be called could repair whatever weaknesses in Rosenholm's testimony it thought it perceived. As for the date of the Teichman conference—the subject of the witness's change of testimony which was apparently the critical factor in the court's evaluation of his reliability—the prosecutor made clear that the date was not in dispute and would be established by other witnesses (*supra*, pp. 18, 19).[29]

In sum, until the government has had the opportunity to present the whole of its evidence, an acquittal on the evidence—except in the narrow class of cases referred to at pp. 33–35, *supra*—is a usurpation of power. The distinction between an acquittal which, though erroneous, is rendered after the close of the government's case and an acquittal entered prior to that time is not a mere distinction between error and great error, as petitioners suggest (see F. Br. 60–61; S. Br. 34–35) and the concurring judge below concluded (R. 61–62; see *supra*, pp. 31–32). It is, as the majority of the court of appeals held (R. 50, 54–55), the difference between an erroneous decision as to an issue properly before the trial court and a decision made prior to a hearing and therefore before power exists to make a decision at all.

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[29] The court had itself stated earlier that significant aspects of the conference could be proved "aliunde" (R. 558, 571)—*i.e.*, through other witnesses than Rosenholm.

B. GOVERNMENT COUNSEL'S CONVERSATION WITH WITNESS ROSENHOLM DURING A RECESS CONCERNING THE ACCURACY OF A POINT IN HIS TESTIMONY, AS A RESULT OF WHICH THE WITNESS CORRECTED HIS TESTIMONY, WAS NOT A VALID BASIS FOR ACQUITTAL

The trial court had no power to acquit because of the conduct of government counsel in checking with witness Rosenholm during a recess as to the accuracy of a date he had given, as a result of which the witness corrected himself.[30] The ground was inherently defective as a basis for the action taken.

Acquittal—the formal adjudication of an accused's innocence (see *supra*, pp. 29–30)—necessarily implies a determination that the evidence is insufficient to support a proper accusation. The court, therefore, has no power to acquit because of misconduct of the prosecutor and without an adjudication on the merits of guilt or innocence, except possibly where in the court's judgment such conduct renders a fair trial impossible at any time in the future (see *infra*, pp. 38–39). To acquit the accused as a way of disciplining the prosecutor for misconduct is scarcely less arbitrary than convicting the defendant as a way of punishing the defense attorney's misconduct. The court possesses ample power to utilize other effective means to discipline attorneys for trial misbehavior.[31]

[30] This would have been an invalid basis for acquittal irrespective of the point in the trial at which the judgment was entered.

[31] *E.g.*, in an aggravated situation, where a simple reprimand seemed inadequate or had proved ineffective, the power of contempt might appropriately be exercised. Cf. *Offutt* v. *United States*, 348 U.S. 11; *Sacher* v. *United States*, 343 U.S. 1; *Cooke* v. *United States*, 267 U.S. 517. In an extreme case, where it appeared that the misconduct was such as to compromise the fairness of the trial, a mistrial could be declared. Cf. *Gori* v. *United States*, 367 U.S. 364.

"A criminal prosecution is more than a game in which the Government may be checkmated and the game lost merely because its officers have not played according to rule." *McGuire* v. *United States,* 273 U.S. 95, 99.

The court, of course, retains power to take action considered necessary to insure that persons accused in its forum receive a fair trial. Pursuant to this power the court may declare a mistrial where, in its judgment, the conduct of the prosecutor renders the proceeding unfair to the accused (*Gori* v. *United States,* 367 U.S. 364). It is at least arguable that the same power may be utilized by the court to acquit the defendants so as to bar any future retrial where misconduct by the government is of such a nature as to prevent a fair trial from ever being held [33] (*e.g.,* if a key defense witness were deported to prevent him from testifying, or if records vital to the defense were destroyed by agents of the government [33]) or where the government deliberately refuses to obey a valid court order designed to give the defendant a fair trial.[34] Even in such circumstances, however,

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[33] Cf. *Caldwell* v. *United States*, 205 F. 2d 879, 881–882, note 11 (C.A. D.C.).

[33] Cf. *United States* v. *Heath*, 260 F. 2d 623 (C.A. 9) (defendant's records, vital to defense, lost by government agents to whom they had been loaned; trial had not commenced; indictment dismissed).

[34] Cf. *Jencks* v. *United States*, 353 U.S. 657, 672, where the Court said that a criminal action "must be dismissed" where the government, on the ground of privilege, elects not to comply with an order to produce for the accused's inspection statements in its possession of government witnesses touching the subject matter of their testimony. But see 18 U.S.C. 3500(d), where Congress has provided the lesser remedy of

the appropriate remedy would be to dismiss the indictment (or declare a mistrial), with prejudice. For the action, no matter how aggravated, is not probative of the guilt or innocence of the accused. But even assuming that in such circumstances a court might have power to acquit, no such situation arose here (see Appendix, *infra*, pp. 63–66; R. 572–575).

The trial court itself did not believe that government counsel had engaged in any deliberate misconduct (see *supra*, pp. 19, 20–21). Actually, as the court of appeals held (R. 53), there was no misconduct at all. The trial court had earlier suggested the very conduct to which it later took such violent exception, proposing to a government witness (Palliotto) that he "rehearse" his testimony on a certain point with government counsel (R. 148; see also R. 118). It is difficult, therefore, as the court of appeals observed (R. 53), "to understand the basis for the judge's criticism of the Assistant United States Attorney for talking with a Government witness during a recess."

> We are not aware of any rule of law, "elementary" or otherwise, or any canon of professional conduct forbidding the practice. Of course, as a matter of trial tactics, counsel ordinarily avoid talking with a witness during a recess called while the witness is on the stand so as not to provide opposing counsel with a point to argue to the jury. But tactics are one thing and rules of law and canons of ethics are quite another.

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striking the testimony of the witness from the record, unless the court in its discretion determines "that the interests of justice require that a *mistrial* be declared" (emphasis added).

The point about which counsel spoke to the witness—the date of the Teichman conference—was not in dispute. As counsel advised the court, the date of the conference was "a matter that other witnesses will testify to * * *. It can be ascertained when it happened" (R. 570). The witness's original testimony as to the date, moreover, was only an estimate given in response to insistent questioning by the court [35] after the witness had stated that he was not sure of the date (R. 552). Counsel's motivation in raising the point with the witness during the recess was the desire for "the truth to come out" (R. 569).[36] He might, to be sure, have waited until the witness had resumed the stand, but there was no impropriety in his acting during the recess. Counsel's handling of the matter, as the court of appeals observed (R. 53), merited commendation rather than censure. Cf. *Frazer* v. *United States*, 233 F. 2d 1, 2 (C.A. 9), where, as the court noted (R. 53), "counsel for the Government was commended for privately reminding a witness of a false statement in her testimony thereby causing her to change her testimony to conform to the truth."

We conclude, therefore, that the extraordinary judgment of acquittal was the result of

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[35] It appears from the transcript that the court's question may have suggested the erroneous year, 1958, as the date of the conference (R. 552):

"Q. Approximately when did you have the discussion?

"A. I am not sure.

"The COURT. Can't you tell us whether it was 1958 or—?

"The WITNESS. It was 1958."

[36] It would have been improper for counsel to have left standing the witness's incorrect estimate of the date, when he knew it to be wrong. Cf. *Napue* v. *Illinois*, 360 U.S. 264, 269.

an assertion of non-existent power. The court's action was substantially the same as if he had walked into the courtroom on the first day of trial and directed an acquittal, as Judge Aldrich suggested, "on the basis of some rule of thumb that more than three government questions, asked in good faith, but regarded by the court as irrelevant, had unduly delayed the trial" (R. 63). The judgment, having no foundation in legal power, was a nullity.

II

BEING A NULLITY, THE ACQUITTAL IS NOT A BAR TO THE ACCUSED'S RETRIAL AND WAS PROPERLY ORDERED VACATED

A. AN INVALID JUDGMENT OF ACQUITTAL, PRECISELY BECAUSE IT IS A NULLITY, WILL NOT SUPPORT A PLEA OF *AUTREFOIS ACQUIT*

1. Few principles of the Anglo-American law have a longer history or are more properly revered than the rule that, once acquitted, a man may not be tried again. This Court, we of course agree, must be alert to prevent encroachments upon the rule. On the other hand, as the Court has said, in the field of double jeopardy as in other areas of the law, one must guard against "the mechanical application of an abstract formula" (*Wade* v. *Hunter*, 336 U.S. 684, 691). What petitioners, in essence, ask this Court to do is to apply mechanically the "abstract formula" of the rule of *autrefois acquit* to a unique factual situation never intended to be encompassed by the rule and wholly foreign to its spirit and true purpose. Because the trial court pronounced the formula of "acquittal," they say, the government is barred for-

ever from further prosecutive action—regardless of whether the court had power to take such action,"[37] and irrespective of the interests of justice.

The court of appeals, we contend, properly rejected this argument. With Judge Aldrich, we are "unwilling to think that such a totally arbitrary act in the course of trial with no semblance of justification behind it, should deprive the government of its day in court" (R. 63–64). "As against a defendant's right to be free from double jeopardy," as Judge Aldrich observed, "there is the interest of the public in the prosecution and conviction of criminals" (R. 63). We submit that the judgment of the court of appeals, without in any wise trenching upon petitioners' right to be free from double jeopardy, has properly protected this public interest. For it can be said as pertinently in this case as the court of appeals said in *Gori,* that for petitioners "to receive absolution for [their] crime[s] * * * because the judge acted too hastily in [their] interest, would be an injustice to the public in the particular case and a disastrous precedent for the future." *United States* v. *Gori,* 282 F. 2d 43, 48 (C.A. 2), affirmed, 367 U.S. 364.

2. If it be concluded, as we think it must, that the trial court lacked power to enter the judgment of acquittal, it follows that petitioners' contention that the court of appeals was prevented by the principles of double jeopardy from ordering the judgment vacated

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[37] As noted *infra*, p. 46, note 42, petitioners' arguments on the double jeopardy issue are based in part on the assumption, *arguendo*, that the judgment of acquittal was a nullity.

and the case reassigned for trial (F. Br. 26–42; S. Br. 52–63) should be rejected. As observed by the court of appeals—and on this point there was no dissent—"from our conclusion that the trial judge had no power, that is to say no jurisdiction, to enter judgment of acquittal, it follows under principles too well established to require citation of authorities that the judgment is void—a nullity—and hence affords no basis for the defense of double jeopardy" (R. 58). A judgment having "absolutely no legal force or effect" [38] cannot support a plea of *autrefois acquit*.

We do not contend that the exact issue presented here—whether a judgment of acquittal, void because the trial court acted in excess of its power, bars retrial—has been previously decided in favor of the government. However, neither can the petitioners assert that any court has resolved the issue in their favor. To our knowledge, the precise question has never been presented. The Court is free, therefore, to decide the case as reason and justice dictate. We believe that the right of the accused to be free of oppression in the form of multiple trials does not here demand denial of "the interest of the public in the prosecution and conviction of criminals" (R. 63). Cf. *Ex parte United States*, 287 U.S. 241, 249; *United States* v. *Thompson*, 251 U.S. 407, 415. Both may be preserved without renunciation of the policies which gave rise to the rule and the principles which this Court has declared in previous decisions interpreting its meaning.

[38] Black's Law Dictionary (3d ed.), "Nullity."

It is a well recognized axiom in the law of double jeopardy that the defense of *autrefois acquit* is available only where the accused was acquitted by a tribunal having jurisdiction.[39] "An acquittal before a court having no jurisdiction," as this Court observed in *United States* v. *Ball*, 163 U.S. 662, 669, "is, of course, like all the proceedings in the case, absolutely void, and therefore no bar to subsequent indictment and trial in a court which has jurisdiction of the offence."[40] In *Commonwealth* v. *Peters*, 53 Mass. (12 Met.) 387 (1847)—which the Court cited in the *Ball* case, 163 U.S. at 669, as illustrative of the prin-

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[39] *E.g.*, 2 Hawkins, *Pleas of the Crown* (6th ed., 1787), ch. 35, § 1; 1 Chitty, *Criminal Law* (5th Am. ed., 1847), p. 458; 4 Blackstone, *Commentaries* (Lewis ed., 1900), p. 335; 2 Russell, *Crimes and Misdemeanors* (7th ed. 1910), p. 1984; 1 Bishop, Criminal Law (9th ed., 1923), § 1028; Archbold, *Criminal Pleading, Evidence & Practice* (34th ed., 1959), § 438; see American Law Institute, *Administration of the Criminal Law* (Double Jeopardy) (1935), pp. 11, 92.

[40] To like effect are *Strobhar* v. *State*, 55 Fla. 167, 180 (1908); *Paulsen* v. *People*, 195 Ill. 507, 514 (1902); *State* v. *Odell*, 4 Blackf. (Ind.) 156 (1836); *Slater* v. *Commonwealth*, 239 Ky. 620, 623 (1931); *Crawford* v. *State*, 174 Md. 175, 180 (1938); *Commonwealth* v. *Peters*, 53 Mass. (12 Met.) 387, 392 (1847); *State* v. *Rother*, 130 Mont. 357, 363 (1956); *State* v. *Hodgkins*, 42 N.H. 474, 477 (1861); *People ex rel. Hillman* v. *Hull*, 131 N.Y. Misc. 253, 255 (1928); *State* v. *Howell*, 220 S.C. 178, 184 (1951); *Commonwealth* v. *Myers*, 1 Va. Cas. 188, 248–249 (1811).

The principle applies equally to a prior conviction. *Diaz* v. *United States*, 223 U.S. 442, 449. For state cases see American Law Institute, *Administration of the Criminal Law* (Double Jeopardy) (1935), pp. 92–93. Cf. *Mitchell* v. *Youell*, 130 F. 2d 880, 882 (C.A. 4), holding that a prisoner under an invalid state conviction, rendered at a trial in which he was denied the assistance of counsel, was subject to proper retrial by the state authorities.

ciple—the Massachusetts court sustained a state conviction for an offense of which the accused had previously been acquitted by the local federal court. Holding the federal court to have been without jurisdiction of the crime (assault aboard a ship anchored in Boston harbor), the state court ruled that the federal acquittal, being a nullity, was no bar to the state prosecution. "The universal rule," as stated in a comparatively recent study, "is that [an] * * * acquittal in a court having no jurisdiction is not a bar to a prosecution for the same offense in a court having jurisdiction." American Law Institute, *Administration of the Criminal Law* (Double Jeopardy) (1935), p. 92."

" On similar grounds the courts have held, both in this country and in England, that an acquittal procured through collusion or fraud (though the tribunal had general jurisdiction of the offense) is not a bar to a subsequent proper trial. See, *e.g.*, *State* v. *Ketchum*, 113 Ark. 68 (1914); *Brackney* v. *State*, 182 Ind. 343, 345 (1914); *State* v. *Green*, 16 Iowa 239 (1864); *McDermott* v. *Commonwealth*, 30 Ky. L. Rep. 1227 (1907); *Price* v. *State*, 104 Miss. 288, 295 (1913); *State* v. *Simpson*, 79 N.C. 632 (1878); *State* v. *Howell*, 220 S.C. 178, 189 (1951); *The King* v. *Davis*, 12 Mod. 8, 88 Eng. Rep. 1129 (1691); *Rex* v. *Bear*, 2 Salk. 646, 91 Eng. Rep. 547 (1697); *Rex.* v. *Furser*, Sayer, 90, 96 Eng. Rep. 813 (1753); *The King* v. *Taylor*, 3 B. & C. 612, 615-616, 107 Eng. Rep. 860, 861 (1825). See 1 Chitty, *Criminal Law* (5th Am. ed., 1847), p. 657; 9 Bacon's Abridgment (1852 ed.), pp. 627-628; 3 Greenleaf, *Evidence* (16th ed., 1899), § 38; Clark, *Criminal Procedure* (2d ed., 1918), pp. 454-455; 1 Bishop, *Criminal Law* (9th ed., 1923), § 1009; American Law Institute, *Administration of the Criminal Law* (Double Jeopardy) (1935), pp. 12, 104.

A collusively procured conviction is similarly ineffective to bar a proper retrial. See cases collected in American Law Institute, *op. cit. supra*, p. 104.

We recognize that the principle of law, as articulated in these cases, is that where the tribunal lacks jurisdiction of the cause its judgment is invalid because it is part of a total proceeding which is invalid. Here, only the judgment was invalid. The court had jurisdiction of the cause in other respects. But we submit that the same principle should apply in both cases, for it makes no difference from the standpoint of double jeopardy whether the prior acquittal was void because the court exceeded its authority generally or because, while authorized to hear the case, it exceeded its powers in rendering the judgment. See *infra*, pp. 46–48. It is the nullity of the prior judgment, not the reason for the nullity, which renders it ineffectual as the basis of a plea of *autrefois acquit*.

3. Petitioners attempt to avoid the force of this principle [42] by pointing out that it developed in cases where the accused, because the acquitting court lacked jurisdiction, was in contemplation of law never in jeopardy at all. They argue that a retrial would subject them to a second jeopardy and that it is the subjecting of a person, for the same offense, to be twice "put in jeopardy" which the constitutional guaranty in terms forbids (F. Br. 28–29, 34–35; S. Br. 56–59). The argument rests on a manipulation of labels and should be rejected. Cf. *Palko* v. *Connecticut*, 302 U.S. 319, 323.

It is true, of course, that petitioners have been in jeopardy. It does not follow, however, that a retrial

[42] Although they do not acknowledge the judgment's invalidity, petitioners argue that they cannot be retried even if it was invalid (F. Br. 30, 34–35; S. Br. 56–58).

will be a second jeopardy. Petitioners err, we submit, in their assumption that the judgment of acquittal terminated the jeopardy which attached when their trial began. If, as we have argued, that judgment was a nullity, it had "absolutely no legal force or effect" (see *supra*, p. 43) and did not terminate petitioners' jeopardy. The retrial ordered by the court of appeals will thus entail, not a second jeopardy, but a continuation of the first.

The government's position involves no novel concept. On the contrary, petitioners' situation is analogous to that of an accused who is required to undergo retrial following a mistrial—whether resulting from the inability of the jury to agree upon a verdict (*United States* v. *Perez*, 9 Wheat. 579; *Logan* v. *United States*, 144 U.S. 263, 297–298; cf. *Dreyer* v. *Illinois*, 187 U.S. 71, 85–86; *Keerl* v. *Montana*, 213 U.S. 135) or from any one of the other causes which this Court has held to constitute adequate bases for such action (*e.g.*, *Simmons* v. *United States*, 142 U.S. 148; *Thompson* v. *United States*, 155 U.S. 271, 273–274; *Wade* v. *Hunter*, 336 U.S. 684; *Gori* v. *United States*, 367 U.S. 364; cf. *Brock* v. *North Carolina*, 344 U.S. 424; *Lovato* v. *New Mexico*, 242 U.S. 199).[43]

[43] Where a new trial is ordered following the reversal of a conviction on appeal, some courts have similarly viewed the second trial as continuing the jeopardy which originally attached. *E.g.*, *State* v. *Keerl*, 33 Mont. 501, 516 (1905), affirmed on other grounds *sub nom. Keerl* v. *Montana*, 213 U.S. 135. Compare the view of Mr. Justice Holmes (concurred in by Justices White and McKenna) in his dissenting opinion in *Kepner* v. *United States*, 195 U.S. 100, 134: "* * * it seems to me that logically and rationally a man cannot be said to be

The situation of the accused in the "mistrial" cases cannot be distinguished on a theory that in those cases the accused "consents" to be retried, whereas here there has been no such consent. Cf. the arguments of petitioners at F. Br. 35–36, 39–42; S. Br. 58–63. In none of the cases cited above did the defendant "consent"—either to retrial or to the declaration of the mistrial. In some, indeed, the mistrial was declared over the defendant's specific objection.[11] The law is, in short, that a mistrial followed by retrial may be declared in a proper case "without the defendant's consent and even over his objection." *Gori* v. *United States, supra*, 367 U.S. at 368.

The "mistrial" cases also refute the argument of the individual petitioners (F. Br. 35) that their "second trial" will be "undeniably * * * a second jeopardy"

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more than once in jeopardy in the same cause, however often he may be tried. The jeopardy is one continuing jeopardy from its beginning to the end of the cause." Other courts have treated the new trial as involving a second jeopardy, but one to which the accused consented when he asked that the conviction be set aside. See *Green* v. *United States*, 355 U.S. 184, 189, and cases cited. Whichever be the sounder approach from a theoretical viewpoint, it has of course long been settled that the government has a right to retry a defendant who has obtained a reversal of his conviction on appeal. *United States* v. *Ball*, 163 U.S. 662, 671–672; *Green* v. *United States*, *supra*, at 189.

[11] See, *e.g.*, *Simmons* v. *United States*, *supra*, 142 U.S. at 149–150; *Brock* v. *North Carolina*, *supra*, 344 U.S. at 425. Petitioners contend that double jeopardy bars retrial where the court has declared a mistrial in aid of the prosecution. It is beyond dispute, however, that the trial court's action here was not taken for this purpose, and, therefore, that, whatever the validity of the proposition, it has no application to this case.

because it will be "impossible to impanel the same jury and resume the same trial." In the cases involving mistrials, the retrials have also been before new juries. Indeed, in the more common type of mistrial, it is precisely because the first jury could not agree that retrial before a new jury is necessary. But the necessity of impaneling a new jury has never been thought inconsistent with the view that the second trial continues the jeopardy which attached at the first trial, or otherwise to present a valid objection to the procedure on double jeopardy grounds.

4. Underlying petitioners' double jeopardy arguments, perhaps, is the notion that it is somehow offensive to basic concepts of fair play to compel an accused whom a court acquitted again to "run the gantlet" [43] regardless of the court's lack of authority to render such a judgment. The situation of such a person, however, does not differ essentially from that of an accused who has won acquittal in a court which is later held to have lacked authority to hear his case, and who must as a result again submit to trial. The necessity and propriety of the latter procedure has, as we have seen, never been questioned. *Supra*, pp. 44–46. See, particularly, *Commonwealth* v. *Peters*, 12 Mete. (53 Mass.) 387 (1847), which was cited with approval by this Court in *United States* v. *Ball*, 163 U.S. 662, 669.

In one important respect, furthermore, petitioners can lay less claim to judicial sympathy than those defendants who have faced a similar prospect in the historically more typical situation just described. In

[43] *Gori* v. *United States*, 367 U.S. 364, 373 (dissenting opinion).

the same respect, the present case differs—to petitioners' disadvantage—from *Gori* v. *United States*, 367 U.S. 364, a decision which, though it involved a declaration of a mistrial rather than a judgment of acquittal, was similar to this case in that the court's order, while purporting to favor the accused, in fact had the effect of subjecting him to the necessity of a second trial. For petitioners, unlike the defendants in *Gori* and the other cases, brought on themselves the necessity for a second trial, by specifically requesting the entry of the judgment of acquittal which makes the new trial necessary.

In *Gori*, the declaration of the mistrial was wholly unsolicited, although made in defendant's interest. 367 U.S. at 365. It could well be, therefore, that if the court in *Gori* had consulted the wishes of the defendant, he might have indicated a preference to proceed with the trial and so avoid the necessity of a second trial. This Court nevertheless sustained the second trial as not barred by the prohibition against double jeopardy. The trial judge in petitioners' case, on the other hand, did not take the action which has resulted in the need for another trial (the rendering of the abortive and unauthorized judgment of acquittal) until the attorneys for all of the defendants had moved for acquittal (R. 569–570, 572; *supra*, pp. 19–20). It is true that the court invited the making of "a motion" (it did not specify what kind of motion it had in

mind [46]). But the fact remains that the judge did not enter the abortive judgment ending the trial until he was requested to do so. For this reason, we submit, the petitioners themselves are chargeable in some measure with responsibility for the retrial.

5. *Regina* v. *Middlesex Justices* (*Ex parte Director of Public Prosecutions*), [1952] 2 All Eng. Rep. 312,[47] cited by the individual petitioners at F. Br. 32-33, while similar in some respects to the present case, is not a precedent for reversal of the court of appeals. The case arose on a motion by the Attorney General, in the Queen's Bench Division of the High Court, for an order of certiorari quashing an acquittal on a charge of operating a vehicle while under the influence of liquor, and for an order of mandamus directing the justices of the Middlesex Quarter Sessions (where the acquittal had occurred) to try the charge. It was the contention of the Crown that, notwithstanding the acquittal, there had been no real trial.

It appeared that, before the jury had been sworn, the chairman of the Quarter Sessions stated to the prosecuting attorney, within the jurors' hearing, that he had "read the depositions very carefully"[48] and

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[46] That the defense attorneys were not sure what kind of "motion" the judge had in mind is evidenced by the fact that one of them moved for acquittal or in the alternative that the testimony of the witness Rosenholm (the witness then on the stand, whose change of testimony had triggered the colloquy which resulted in the acquittals) be stricken (R. 572; *supra*, p. 19, note 16).

[47] The case is reported more fully under a slightly different caption at [1952] 2 Q.B. 758.

[48] These depositions had been taken previously in the "petty sessional court," where the defendant had been afforded the right of cross examination. [1952] 2 Q.B. 758, 764.

that he "did not think any jury would convict." The prosecutor advised the chairman that the evidence was, in the Crown's view, sufficient to warrant submission to the jury and that he had instructions to proceed. The chairman permitted the jury to be sworn and the prosecutor to make an opening statement outlining the evidence he proposed to present. Following the prosecutor's opening, but before any evidence was adduced, the chairman displayed to the jury certain documents bearing the handwriting of the defendant, which the latter had supposedly written shortly following the incident involved in the charge, and said: "Just look at it, members of the jury. That is handwriting which, it is suggested, is the handwriting of a man under the influence of drink. It is a matter entirely for you, but I think it is just sheer waste of time for you to consider it." The chairman then asked the jury whether it wished to hear the prosecution's evidence. The foreman replied, "Under your direction, I should say no, my Lord," whereupon a verdict of "Not Guilty by direction" was entered ([1952] 2 All Eng. Rep. at 312–313; [1952] 2 Q.B. at 763–767).

The Queen's Bench Division, while expressing its "gravest disapprobation" of the chairman's action ([1952] 2 All Eng. Rep. at 313; [1952] 2 Q.B. at 767), nevertheless declined to quash the judgment. It agreed that "in one sense" there had been no trial, since the chairman's action had "prevented any evidence from being given," but held that it (the review-

ing court) had ([1952] 2 All Eng. Rep. at 313; [1952] 2 Q.B. at 768):

> no power to order a re-trial in any case unless there has been what in law can properly be described as a mistrial and consequently a nullity.

The decision is distinguished by the fact that, before directing the acquittal, the trial court there had "very carefully" familiarized itself with the pre-trial depositions of witnesses to be called by the prosecution, which were available as a result of proceedings already had in the petty sessional court, where cross examination was permitted (*supra*, p. 51). Based upon these depositions and upon exhibits of the defendant's handwriting taken immediately after the arrest and after hearing the prosecution's opening statement, the court concluded "it is just sheer waste of time" for the jury to hear the case (2 All Eng. Rep. at 312; 2 Q.B. at 765), and therefore directed the acquittal. This action, however much in error and however much disapproved, confronted the Queen's Bench Division with an entirely different issue than that presented here where the trial court acquitted *without knowledge* of the prosecution's case in chief. The difference is crucial (see *supra*, pp. 29–36). It is the difference between an erroneous action within the court's power (acquittal on the evidence) and action before the court has power to act (acquittal without knowledge of the evidence).

We submit further that this decision is not persuasive because of the historical differences in the British and American attitudes towards second trials (see *Green* v. *United States*, 355 U.S. 184, 203 (dissenting

opinion of Mr. Justice Frankfurter)). The position of the British courts appears to be that the rule against double jeopardy precludes retrial wherever there has been a final judgment, provided the court had jurisdiction of the cause.[49] A defendant whose conviction is set aside on appeal goes free (*ibid.*, and sources there cited). Since the rule has never been given such an interpretation in the federal system, petitioners' reliance on the *Middlesex Justices* decision is misplaced.[50]

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[49] The rule does not appear to be applied where an acquittal was procured through collusion or fraud. See *supra*, p. 45, n. 41.

[50] The *Middlesex Justices* case is also marked by the inadequate and inapposite rationale which impelled the Queen's Bench Division to rule against the Attorney General. Thus, the Chief Justice said ([1952] 2 All Eng. Rep. at 314: [1952] 2 Q.B. at 768–769):

"* * * Here we are unable to say that there has been anything in the nature of a mistrial. To constitute a mistrial the proceedings must have been abortive from beginning to end so that, had the record been drawn up, the error would have been apparent: [Citation omitted.] The fact that the jury have acquitted without evidence would not appear on the record. This is what happens whenever counsel for the prosecution offers no evidence. The prisoner is then in charge of the jury and they are directed to return a verdict of Not Guilty, no evidence having been offered. The verdict is received and recorded, and the prisoner is discharged. Suppose counsel for the prosecution in the exercise of his discretion offered no evidence, it would not be open to the prosecutor to come to this court and ask that the case should be sent down for re-trial because he wanted evidence given and did not agree with the course that counsel had adopted. Here the defendant was properly arraigned and the jury sworn to try him, so technically he was in peril, and as they returned a verdict of Not Guilty, however improperly that verdict may have been obtained, this court cannot, as it seems to us, direct a new trial. * * *"

B. THE JUDGMENT WAS PROPERLY ORDERED VACATED BY THE COURT OF APPEALS IN THE EXERCISE OF ITS POWER UNDER THE ALL WRITS ACT

We have shown that the judgment of acquittal was void (*supra*, pp. 27–41), and for that reason is no bar to petitioners' retrial (*supra*, pp. 41–54). It remains only to consider whether the court of appeals had power under the All Writs Act (28 U.S.C. 1651(a), *supra*, p. 3), by mandamus, to order the district court to vacate the judgment and reassign the case for trial. For, considerations of double jeopardy aside, if the court of appeals had the power, it can hardly be contended—nor do we understand petitioners to suggest—that this was not a proper case for its exercise. We submit that the authority of the court is clear.

The All Writs Act vests in this Court and all courts established by Congress the authority to issue—

> all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

Among the writs thus authorized is mandamus, one of the "traditional use[s] of [which] in aid of appellate jurisdiction both at common law and in the federal courts" has been "to confine an inferior court to a lawful exercise of its prescribed jurisdiction."

Apparently the court feared that, since the records of a proper and an improper proceeding would be indistinguishable, the case would become precedent for orders for retrial after proper proceedings.

The other English case and the two Irish cases cited by the individual petitioners (F. Br. 33–34) have no relevance to this case. In each, an acquittal, the validity of which was challenged, was held valid, but in factual situations wholly different from that involved here, and for reasons not germane.

Roche v. *Evaporated Milk Association*, 319 U.S. 21, 26.[51] Although the writ is "reserved for really extraordinary causes" (*Ex parte Fahey*, 332 U.S. 258, 260) and may not be used as a substitute for appeal (*Bankers Life & Casualty Co.* v. *Holland*, 346 U.S. 379, 382), this Court has never hesitated to approve its use to invalidate an *ultra vires* act of an inferior court where the remedy by appeal, because of exceptional circumstances, is inadequate or ineffective.[52] Where, as here, the allegedly invalid order is not appealable (see 18 U.S.C. 3731), the availability of the writ has never been questioned.[53]

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[51] See also *Bankers Life & Casualty Co.* v. *Holland*, 346 U.S. 379, 382; *United States Alkali Association* v. *United States*, 325 U.S. 196, 202; *De Beers Consolidated Mines* v. *United States*, 325 U.S. 212, 217; *Ex parte Peru*, 318 U.S. 578, 583; *In re National Labor Relations Board*, 304 U.S. 486, 496; *Ex parte United States*, 287 U.S. 241, 248–249; *Stratton* v. *St. Louis Southwestern Railway Co.*, 282 U.S. 10, 15–16; *Ex parte Northern Pacific Railway Co.*, 280 U.S. 142; *Ex parte United States*, 242 U.S. 27, 39–40; *Ex parte Metropolitan Water Co.*, 220 U.S. 539, 545–546; *Ex parte Harding*, 219 U.S. 363; *Virginia* v. *Paul*, 148 U.S. 107, 122–123; *Virginia* v. *Rives*, 100 U.S. 313, 323–324.

[52] Cf. *Beacon Theatres* v. *Westover*, 359 U.S. 500, 511; *La Buy* v. *Howes Leather Co.*, 352 U.S. 249, 254–260; *Ex parte Peru*, 318 U.S. 578, 584–587; *In re National Labor Relations Board*, 304 U.S. 486, 496; *Ex parte Skinner & Eddy Corporation*, 265 U.S. 86, 95–96; *Ex parte Peterson*, 253 U.S. 300, 305–306.

[53] See, *e.g.*, *Stratton* v. *St. Louis Southwestern Railway Co.*, 282 U.S. 10, 15–16 (order by single judge which only statutory three-judge court had power to make); *Ex parte Northern Pacific Railway Co.*, 280 U.S. 142 (same); *Ex parte Metropolitan Water Co.*, 220 U.S. 539, 545–546 (same); *Virginia* v. *Paul*, 148 U.S. 107, 122–123 (improper assumption by federal court of jurisdiction over state criminal prosecution). Cf. *United States* v. *Smith*, 331 U.S. 469 (order granting new trial after affirm-

While the writs authorized by the Act are such as may be "in aid of their [the issuing courts'] respective jurisdictions," it is unnecessary (in the case of an appellate court) that its jurisdiction have already attached at the time the writ is sought. No actual appeal, in other words, need then be pending. It is enough if the case lies within the court's potential appellate jurisdiction.[54] "[T]he true rule," as this Court observed in *McClellan* v. *Carland*, 217 U.S. 268, 280, "[is] that where a case is within the appellate jurisdiction of the higher court a writ of mandamus may issue in aid of the appellate jurisdiction which might otherwise be defeated by the unauthor-

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ance of prior order denying identical relief); *Ex parte United States*, 287 U.S. 241 (refusal to issue bench warrant following return of indictment); *Ex parte United States*, 242 U.S. 27, 39–40 (order suspending execution of minimum mandatory sentence); *Ex parte United States*, 101 F. 2d 870, 873 (C.A. 7), affirmed by an equally divided Court *sub nom. United States* v. *Stone*, 308 U.S. 519 (judgment of acquittal *non obstante veredicto*).

In *Virginia* v. *Paul*, the Court, pointing to the inability of the State to appeal if the case proceeded to trial in the federal court and resulted in acquittal (148 U.S. at 122), observed that "A stronger case for issuing a writ of mandamus can hardly be imagined" (*id.* at 123). Cf. *Maryland* v. *Soper* (*No. 1*), 270 U.S. 9, 28–30; *Roche* v. *Evaporated Milk Association*, 319 U.S. 21, 31, n. 5.

[54] *Roche* v. *Evaporated Milk Association*, 319 U.S. 21, 25; *Ex parte United States*, 287 U.S. 241, 246; *McClellan* v. *Carland*, 217 U.S. 268, 279–280; *In re Pennsylvania Co.*, 137 U.S. 451, 452; *Insurance Co.* v. *Comstock*, 16 Wall. 258, 270; *Kendall* v. *United States*, 12 Pet. 524, 621–622; *Ex parte Bradstreet*, 7 Pet. 634; *United States* v. *United States District Court*, 238 F. 2d 713, 718–719 (C.A. 4), certiorari denied *sub nom. Valley Bell Dairy Co.* v. *United States*, 352 U.S. 981; *Frankel* v. *Woodrough*, 7 F. 2d 796, 797 (C.A. 8).

ized action of the court below." Here, the court of appeals would have had jurisdiction under 28 U.S.C. 1291 to review a judgment of conviction (had the trial, permitted to run its normal course, ended in this result) and, under 18 U.S.C. 3731, to review certain kinds of orders in arrest of a judgment of conviction.[35]

The present case is thus not essentially different from *Ex parte United States,* 287 U.S. 241, where the act commanded by the writ was the issuance of a bench warrant for the arrest of one against whom an indictment, fair upon its face, had been returned. Concluding that mandamus was "[u]ndoubtedly * * * the appropriate remedy," the Court observed that the district court's refusal to issue a warrant had the effect of denying to the government its "absolute right * * * to put the accused on trial" and "f[ell] little short of a refusal to permit the enforcement of the law." 287 U.S. at 249, 250. The same consequences for the administration of justice flowed from the court's unauthorized action in the present case. As observed by the court of appeals (R. 57–58):

> If, under the circumstances disclosed by the record before us, a district judge for no good reason can halt the presentation of the Government's evidence in a criminal case and enter judgment of acquittal, the action of the grand jury in returning the indictment would be just as much flouted, and the Government fully as frustrated in the performance of its duty to

[35] During the trial, particularly its earlier stages, the trial court manifested a constant awareness of the potential appellate jurisdiction of the court of appeals, calling attention to it on many occasions (see, *e.g.*, R. 98, 121–122, 128, 132, 142, 148, 178).

> prosecute persons regularly and properly charged with crime as though the judge at the outset had refused to issue a bench warrant for the arrest of the accused. The action of the trial judge in one situation falls as little short of a refusal to permit enforcement of the criminal law as in the other.[56]

There is no merit in petitioners' contention (F. Br. 22, 42–58; S. Br. 47, 50) that, because the Congress has manifested a hostility to appellate review of verdicts favorable to defendant, the court of appeals was without power to act here. The contention incorporates its conclusion by assuming that Congress intended to insulate void, as well as valid, acquittals. However, there is no such indica-

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[56] In *United States* v. *United States District Court*, 238 F. 2d 713 (C.A. 4), certiorari denied *sub nom. Valley Bell Dairy Co.* v. *United States*, 352 U.S. 981 (mandamus to vacate orders of a district court which interfered with the conduct of a grand jury investigation), the potential jurisdiction of the appellate court was substantially more remote than in either *Ex parte United States* (287 U.S. 241) or here. In that case no indictment had been returned. The court concluded, nevertheless, that the "potential litigation involved in a grand jury investigation" lay "within [its] appellate jurisdiction." "[I]f that jurisdiction is being thwarted by erroneous exercise of power or abuse of discretion by the District Judge," the court held, "there is no more reason why this court should not exercise its power than in the case where the judge is refusing to issue a bench warrant [referring to *Ex parte United States*, *supra*]. It is argued that a grand jury might not find indictments, in which event there would be nothing with respect to which appellate jurisdiction could be exercised; but, of course, there would have been nothing with respect to which appellate jurisdiction could have been exercised if the trial of the person arrested under the bench warrant had resulted in an acquittal." 238 F. 2d at 718–719. See also *United States* v. *Malmin*, 272 Fed. 785, 796 (C.A. 3).

tion in the legislative history cited in petitioners' briefs (F. Br. 42–58; S. Br. 47–52). Indeed, the legislative history indicates that Congress never contemplated the situation presented by a void acquittal, granted in excess of the court's power, and directed its hostility only against appellate review encroaching upon the prohibition against double jeopardy. Thus, the letter of the Attorney General requesting changes in the Criminal Appeals Act, cited by the individual petitioners at page 51 of their brief, specified that right to review: [57]

> should, of course, be limited to cases in which there has not been a verdict in favor of the defendant, for in such an instance the rule against double jeopardy would conclusively bar the Government against securing a review.

Where, as we have shown, double jeopardy is not a bar because the judgment of acquittal was a nullity, the congressional attitude was not hostile.

For these reasons, we submit, the court of appeals, in the exercise of its supervisory control of the administration of justice in the courts of its circuit, had the unquestionable authority, in the exceptional circumstances shown by this record, to direct the district court, by mandamus, to vacate its *ultra vires* judgment. Cf. *La Buy* v. *Howes Leather Co.*, 352 U.S. 249, 259–260.[58]

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[57] Letter, Attorney General to Speaker of the House, printed in H. Rep. No. 45, 77th Cong., 1st Sess., p. 2 (1941).

[58] The court of appeals, while noting that the government, in its application for mandamus, had not asked it to do so (R. 58), ordered nevertheless that the case be reassigned for trial before another judge (R. 59). The reason for the direction

CONCLUSION

For the foregoing reasons it is respectfully submitted that the judgment of the court of appeals should be affirmed.

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DECEMBER 1961.

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was that the court (R. 58–59) "d[id] not see how a judge who has unnecessarily taken it upon himself to cross-examine witnesses not only extensively but also sharply can either listen to their testimony reflectively or weigh their testimony dispassionately."

The corporate petitioner, in its petition for certiorari, challenged the authority of the court of appeals to make such an order (Pet. 19–20; Question 7, Pet. 4). Although this Court, in granting certiorari, did not limit the writ, the contention has not been renewed. We assume, accordingly, that it has been abandoned. In any event, the inclusion of such a direction in the order granting mandamus was a clearly reasonable incident of the order and one which the court had authority to make in the exercise of its supervisory control of the administration of justice in its circuit. See *La Buy* v. *Howes Leather Co.*, *supra*. This Court, in comparable situations, has issued similar directions. See, *e.g.*, *Offutt* v. *United States*, 348 U.S. 11, 18; *Calvaresi* v. *United States*, 348 U.S. 961; *Cooke* v. *United States*, 267 U.S. 517, 539.

APPENDIX

THE TRIAL JUDGE'S STATEMENT TO THE JURY ON THE OCCASION OF HIS ORDERING THE RETURN OF VERDICTS OF ACQUITTAL (R. 572–576)

The COURT: Mr. Foreman and Members of the Jury, before I say anything else, let me make it absolutely clear that counsel for the defendants as well as the Court are persuaded that neither the United States Attorney nor either of his assistants consciously or deliberately violated any canon with which they were familiar. They were acting subjectively in good faith, and I do not mean at any stage of the remarks I am about to make to criticize them in the sense that I believe that they were conscious wrongdoers.

On the other hand, a criminal prosecution is the most solemn proceeding which takes place in a court, and one of the most solemn activities with which man could be concerned on earth. The standards of a criminal prosecution in the United States require a constant awareness of the rights and liberties guaranteed by the United States Constitution, and a constant sensitivity with respect to the value of an open trial conducted with a full protection of the rights of any individual or any corporation summoned to answer a criminal charge.

In the case before you there have been a number of difficult problems, and I have no question that you have been presented with witnesses who were the best that the government could offer, but they were witnesses who on the stand showed a lamentable lack of

awareness or lack of capacity in connection with their testimonial obligations.

Frequently during the trial of this case I have had to do what I never did before in eighteen and one-half years, remind the witnesses of the solemnity of their function, and the necessity that they should recall accurately and state accurately the testimony which they were giving in matters of the utmost significance.

Were I not engaged in such a serious set of remarks to you, I would be tempted to rest upon a story which Chief Justice Wilkins told at the Judicial Conference, somewhat different from the one that I recited to you the other day. He referred to a case tried by Judge Otis Lord of the Superior Court of the Commonwealth of Massachusetts in the middle of the 19th century, and he said that after the most fluctuating kind of testimony by witnesses in that criminal case Justice Lord in addressing the jury said, "I think it would be sufficient if I instructed you that if you believe the witnesses for the government you will convict the prisoner; if you believe the witnesses for the prisoner, you will acquit him; if, like myself, you do not believe either of them you will then acquit the prisoner because the government has the burden of proof beyond a reasonable doubt."

And though that story may seem to you to be humorous, I think you will also say that it has considerable application to the difficulties which we have faced in this case.

That is not to say that the difficulties were created by the United States Attorney or his assistants. They were faced by them. It is in the atmosphere of this fluctuating testimony that yesterday afternoon we had testimony on a most vital point given by Mr. Rosenholm. You cannot fully appreciate how vital, because you haven't read the text of the indictment and I have not hitherto had any occasion to discuss with

you the problem of conspiracy, which is one of the essential elements in a part of this indictment. And you can't know, as I do, that the prosecution was endeavoring to show that a lawyer, together with others not named as defendants, together with the defendants, conspired to defraud the United States, that in this connection the admissibility of the testimony depended to a very considerable extent upon the date of an alleged conference in which the attorney participated. But you did hear that that date was given by this witness, Mr. Rosenholm, on the stand yesterday, and that I declared a recess yesterday afternoon in order that the government might be fully prepared to lay a foundation for the admissibility of the testimony that it relied upon with respect to this alleged conspiratorial conference.

During the recess, and without in any way being conscious of a potential violation of any canon of ethics or any rule or principle, the Assistant United States Attorneys in this case admittedly conferred with this witness who was on the stand, and the conference with him took place either in the offices of the United States Attorney or in some similar place. It took place this morning before court, not under the supervision of a judge, and without the presence of the defendants or counsel for the defendants.

In this situation the witness took the stand this morning and on this very vital point gave an altered version in which the date now given becomes quite significant and has a connotation and importance which the date he gave yesterday did not have.

He is a witness who already has shown either a lamentable lack of memory or an extraordinary power of inventiveness, as you will recall in connection with the cards where he gave a whole series of answers which he withdrew.

With due regard for the principles of justice under law, I must bear in mind not only what may be correct, but what is fair. In our constitutional system, under our jurisprudence, many things which are true are not allowed to be shown. Examples are a confession extorted by physical coercion; such a confession is not admissible although it may be perfectly correct and the defendant may be guilty. Likewise, information procured by an unlawful search and seizure may be perfectly true and the defendant may be guilty; nonetheless it is well settled that no conviction can be based lawfully upon information unconstitutionally procured by an unreasonable search or seizure.

These principles illustrate the sensitivity of American courts to fair play in connection with every aspect of the criminal law. It is not the duty of a court to see that every guilty man is punished. It is the duty of a court to see that every man gets a fair trial. The highest public interest is not the punishment of the wicked, but the establishment and maintenance of justice under law.

VERDICTS OF ACQUITTAL

Bearing in mind those principles, and responding to the motions of acquittal made by counsel for the individual defendants and the corporate defendant, I direct you at this stage to return the verdicts of acquittal with respect to each of the individuals and with respect to the corporation.

(The Court then heard requests of Jurors to be excused.)

The Court: The defendants will stand. (The defendants complied.) You have been acquitted by direction of the Court and by the Court. Your bail is terminated. You are free.

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